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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROOSEVELT DANIELS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit erred in treating an expired grand jury as extended based on recitations contained in a judicial "order" that was ghostwritten by the government, premised on false facts, and procured *ex parte* from a judge who was without jurisdiction?

2. Whether the extension of a special grand jury based solely on a disputed, unrecorded and uncommunicated mental determination of a chief judge without entry of a court order violates 18 U.S.C. §3331?

3. Whether the Seventh Circuit erred in expanding the "ordinary course of duty" exception to Title III's warrant requirement in direct conflict with other federal courts of appeals?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners Roosevelt Daniels, Edward Fitzgerald, Lawrence Lee and Sandra Campbell, and the Respondent United States of America.

These same parties are the Petitioners and Respondent, respectively, before this Court.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Roosevelt Daniels, Edward Fitzgerald, Lawrence Lee and Sandra Campbell respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on May 10, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 902 F.2d 1238, and is reprinted in the Appendix hereto at App. 1.

The order of the Court of Appeals denying Petitioners' Petition for Rehearing With Suggestion for Rehearing *En Banc*, dated June 11, 1990, is reprinted in the Appendix hereto at App. 14.

JURISDICTION

Petitioners were charged in the United States District Court for the Northern District of Illinois with violations of 18 U.S.C. §1962(c) and 21 U.S.C. §§841(a)(1), 843(b), 846 and 848. The District Court exercised jurisdiction pursuant to 18 U.S.C. §§3231 and 3232. On May 5, 1989, the District Court entered its judgment of conviction and sentence upon Petitioners.

Petitioners appealed to the United States Court of Appeals for the Seventh Circuit, invoking jurisdiction under 28 U.S.C. §1291. The Seventh Circuit affirmed the orders of the District Court on May 10, 1990. *See* App. 1. On May 24, 1990, Petitioners filed a timely Petition For Rehearing With Suggestion For Rehearing *En Banc*. On June 11, 1990, the Seventh Circuit denied the petition for rehearing. *See* App. 14.

Petitioners invoke the jurisdiction of this Court to review the judgment and order of the Seventh Circuit under 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 U.S.C. §3331. Summoning and term.

(a) In addition to such other grand juries as shall be called from time to ~~time,~~ each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

(b) If a district court within any judicial circuit fails to extend the term of a special grand jury or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry upon such application by the chief judge of the cir-

cuit of an appropriate order. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

FED. R. CRIM. P. 55. Records.

The clerk of the district court and each United States magistrate shall keep records in criminal proceedings in such form as the Director of the Administrative Office of the United States Courts may prescribe. The clerk shall enter in the records each order or judgment of the court and the date such entry is made.

18 U.S.C. §2510. Definitions.

As used in this chapter . . .

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than—

> (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties[.]

18 U.S.C. §2515. Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceeding in or before any court, grand jury, department, officer, agency,

regulatory body, legislative committee, or other authority of the United States, a State, or a political Subdivision thereof if the disclosure of that information would be in violation of this chapter.

STATEMENT OF THE CASE

Grand Jury Issue

Petitioners Roosevelt Daniels, Edward Fitzgerald, Lawrence Lee and Sandra Campbell ("Petitioners") were charged in a series of indictments with violations of various sections of Titles 18 and 21 of the United States Code. They pled guilty to a second superseding indictment[1] and were sentenced on May 5, 1989 to terms of imprisonment of 40, 20, 15 and 12 years, respectively.

On August 26, 1986, the second superseding indictment was returned. Petitioners initially pled not guilty to the charges in the indictment, but changed their pleas to guilty as to all charges on September 9 and 10, 1986. Prior to sentencing, however, Petitioners discovered that the term of the grand jury which returned the second superseding indictment against Petitioners, the Special October 1984 Grand Jury ("Grand Jury"), had expired and had not been extended.

On February 27, 1987, Petitioners filed a motion for writ of *habeas corpus* in the district court, demanding their immediate release from custody on the ground that the indictment pending against them was invalid because it

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[1] Roosevelt Daniels was charged with violating 18 U.S.C. §1962(c) and 21 U.S.C. §§841(a)(1), 843(b), 846 and 848. Edward Fitzgerald was charged with violating 18 U.S.C. §1962(c) and 21 U.S.C. §§841(a)(1) and 846. Lawrence Lee was charged with violating 18 U.S.C. §1962(c) and 21 U.S.C. §§841(a)(1), 843(b) and 846. Sandra Campbell was charged with violating 18 U.S.C. §1962(c) and 21 U.S.C. §§843(b) and 846.

was returned by an expired grand jury. At a court hearing that day, the United States Attorney (the "Government") admitted that no order could be found in the court clerk's office extending the Grand Jury. Nonetheless, the district court denied the requested relief, finding that "nothing before [the court] indicate[s] that [the] grand jury was invalidly constituted at the time that it returned [the second superseding] indictment." App. 19.

Upon the denial of their motion for writ of *habeas corpus*, Petitioners filed a petition for writ of *mandamus* with the Seventh Circuit Court of Appeals on March 2, 1987, arguing that they were unconstitutionally being held in custody pursuant to an invalid indictment. The Government filed its response on March 4, 1987, stating that the factual and legal issues concerning the expiration of the Grand Jury had not been fully presented to District Court Judge Holderman, to whom this case was assigned. The Government further stated that it was in the process of developing the facts surrounding the alleged extension of the Grand Jury and would report its findings to him. Accordingly, on March 5, 1987, the Court of Appeals denied Petitioners' *mandamus* petition as premature. App. 22. The appellate court explicitly noted that Judge Holderman had yet to evaluate all of the evidence regarding the alleged extension of the Grand Jury's term and that he would be hearing evidence on the issue. *Id.*

Subsequently, Petitioners' counsel learned that then-Senior District Court Judge Frank J. McGarr was purported to be somehow involved concerning the issue of the alleged extension of the Special October 1984 Grand Jury. Judge McGarr had been Chief Judge of the district, and therefore in charge of grand juries, at the time the Grand Jury issued Petitioners' second superseding indictment. In March 1987, however, he was not involved with any matter pertaining to grand juries.

Counsel for Petitioner Daniels wrote a letter to Judge McGarr on March 9, 1987 regarding any current involvement by Judge McGarr with the extension issue and objecting to any proceedings being held without counsel's appearance and participation. App. 60. Daniels' counsel also informed Judge McGarr that the issue of the Grand Jury's validity was already the subject of a pending motion before Judge Holderman and stated his belief that Judge McGarr lacked jurisdiction as to the Grand Jury since he was no longer Chief Judge and since no case or controversy was pending before him. *Id.* Judge McGarr replied to Daniels' counsel by letter dated March 10, 1987 stating that he had already entered an order concerning the alleged extension of the Grand Jury and that, upon reconsideration, he believed his entry of the order was proper. App. 63.

Also on March 9, 1987, the Government submitted a "report" to Judge Holderman concerning the alleged extension of the term of the Special October 1984 Grand Jury. App. 55. The Government's "report" consisted entirely of an affidavit-like order which facially appeared to be written by Judge McGarr.[2] App. 57-59. The "order" purported to extend *nunc pro tunc* the Grand Jury's term from March 25, 1986 to September 25, 1986, and then held valid all indictments returned during this period. *Id.* The "order" was undated and contained no case number or case caption. The only date shown on the order was Judge McGarr's "Received" stamp dated March 3, 1987, at which

[2] Judge McGarr found that, based on his own "dealings" with the Grand Jury and his own "recollections," he had ordered the Grand Jury to serve an additional six months. App. 57-59.

time Petitioner's *mandamus* petition was pending in the Court of Appeals.[3]

The Government appeared *ex parte* before Judge McGarr and without notice to Petitioners to obtain this "order." Petitioners later discovered that the "order's" findings are nearly identical to those in two *other* orders the Government obtained from Judge McGarr pertaining to two *different* grand juries. *See, e.g., United States v. Taylor*, 841 F.2d at 1330, 1304 n.10 (7th Cir.), *cert. denied sub nom. Rosenstein v. United States*, 487 U.S. 1236 (1988). Later still, the Government conceded that the order signed by Judge McGarr had actually been written by the Government, not by Judge McGarr.[4] Nonetheless, Judge Holderman treated Judge McGarr's "order" as a valid and binding judicial order. App. 25-27.

On March 23, 1987, Petitioners moved to withdraw their guilty pleas and dismiss the second superseding indictment on the grounds that it had been returned by a special grand jury that had not been extended pursuant to 18 U.S.C. §1331(a). R. 426. Petitioners also requested an evidentiary hearing and moved for discovery to fully develop the facts concerning the expiration and the alleged extension of the Grand Jury's term, as required in the Court of Appeals' order of March 5, 1987. R. 424. Petitioners' motion was fully briefed on April 6, 1987. R. 437.

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[3] When the Government filed its response to Petitioners' mandamus petition on March 4, 1987, which told the Seventh Circuit that the grand jury issue was factual in nature and that it was still gathering the facts, the Government had already obtained Judge McGarr's order, which it only later filed in the district court and which it there asserted precluded any examination of the facts and conclusively determined the issue of the Grand Jury's alleged extension.

[4] Although Petitioners questioned the authorship of the "order" from the outset, the Government did not admit to writing the order until it filed its appellate brief in the instant case.

Over one year later, on April 8, 1988, Judge Holderman denied Petitioners' motions, allowing no discovery or evidentiary hearing relating to the expiration and alleged extension of the Grand Jury. App. 42-43. On May 5, 1989, the district court entered its judgment of conviction and sentence. Petitioners timely filed their respective notices of appeal from the district court's denial of their motions to dismiss.

On May 10, 1990, the Seventh Circuit affirmed Petitioner's convictions. *United States v. Daniels*, 902 F.2d 1238 (7th Cir. 1990). The Seventh Circuit found that Judge McGarr's purported order was "not really an order," but was merely evidence. 902 F.2d at 1240, App. 3. The Court of Appeals also noted that Petitioners had submitted evidence that the purported order was "not reliable."[5] *Id.* at 1241, App. 3. Further, the Seventh Circuit found that whether Judge McGarr actually extended the Grand Jury when he was Chief Judge was a "question of fact". *Id.* at 1242, App. 6. The Court of Appeals nonetheless refused to remand the matter for an evidentiary hearing, stating that, although "[t]he 'evidentiary hearing' conducted in this case to determine Judge McGarr's recollection was unsatisfactory, . . . we do not think it was so defective that we should remand for a further hearing at which Judge McGarr would be placed under oath, examined,

[5] Petitioner's primary evidence, which they attempted to present to both the district court and the Court of Appeals, but which both courts failed to address, were transcripts of each of the Grand Jury's actual appearances before then-Chief Judge McGarr during the time he allegedly extended the Grand Jury's term. None of these transcripts gives any indication that Judge McGarr either extended the Grand Jury's term or was even made aware of a *need* to extend it.

and cross-examined, with results entirely predictable."[6] *Id.*, App. 7.

Wiretap Issue

On July 8, 1985, the FBI received "informant" information that Petitioner Daniels was utilizing the Metropolitan Correctional Center ("M.C.C.") prisoner telephone to engage in outside narcotics trafficking. R. 284, Exhibit B, ¶13. At that time, M.C.C. officials began intercepting and recording Daniels' telephone conversations on the inmate pay telephone at the M.C.C. for the first time since Daniels was incarcerated on April 15, 1985. R. 260, Exhibit E. On August 1, 1985, M.C.C. officials provided the FBI with six hour-long cassette tapes of Daniels' intercepted telephone conversations. R. 260, Exhibit E. After this meeting, M.C.C. officials continued to intercept Daniels' telephone conversations. An additional eleven cassette tapes containing telephone conversations monitored by the M.C.C. were later turned over to the FBI. R. 260, Exhibits A, B, C and G. Two of the conversations intercepted by the M.C.C. in July 1985 were utilized by the FBI as probable cause for the issuance of a Title III electronic surveillance order on August 27, 1985. R. 283, Exhibit B, ¶¶17 and 22. Subsequently, the FBI took over monitoring Daniels' telephone conversations from the M.C.C. officials.

A superseding indictment was returned on October 22, 1985, charging Petitioners with additional violations of 21

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[6] As stated above, no evidentiary hearing was ever held concerning this matter. In denying Petitioners' motions, the district court specifically stated that "there's no need for an evidentiary hearing," App. 42, and the Government has never contended that any such hearing took place. The Seventh Circuit's use of quotation marks around the words "evidentiary hearing" may indicate recognition of this fact.

U.S.C. §§841(a)(1) and 843(b) and extending the time frame of the charges based on the FBI's wiretaps of Daniels' conversations. R. 134. These violations were also included in the second superseding indictment. On August 21, 1986, Petitioners filed a motion to suppress the tape recordings secured by the FBI pursuant to the August 27, 1985 order on the grounds that the order was based on the M.C.C.'s earlier illegal wiretaps. R. 260. On September 2, 1986, Judge Holderman denied the motion to suppress solely on the ground that Daniels consented to any electronic surveillance conducted by either the M.C.C. or the FBI. App. 77-78.

On appeal, the Seventh Circuit specifically rejected the district court's finding that Daniels consented to the FBI's surveillance of his telephone conversations. 902 F.2d at 1245, App. 12-13. Notwithstanding that this was the sole basis of the district court's ruling, the Seventh Circuit affirmed the denial of the motion to suppress by making, for the first time, a *factual* finding that the FBI was acting "in the ordinary course of [its] duties" during its surveillance of Daniels. *Id.*, App. 13. The Seventh Circuit ruled that the surveillance was proper under the exception to the order requirement contained in Section 2510(5)(a)(ii) of Title 18. *Id.* The Seventh Circuit did not address the M.C.C.'s earlier, unauthorized wiretaps, the uncontroverted evidence as to their continuous, focused nature, or the fact that these unauthorized wiretaps were the basis for the order which later authorized surveillance by the FBI.

REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit erred in treating an expired grand jury as extended based on recitations contained in a judicial "order" that was ghostwritten by the government, premised on false facts, and procured *ex parte* from a judge who was without jurisdiction.

In February 1987, the Government found itself faced with a massive administrative problem: the potential release of approximately 200 defendants indicted by grand juries[7] which had not been extended beyond their initial terms. Rather than issuing valid new indictments, the Government chose to violate the due process rights of Petitioners and others by writing an affidavit-like order which it presented *ex parte* to a judge to whom Petitioners' case was not assigned in order to create the illusion that the Grand Jury had been extended. Despite the Seventh Circuit's acknowledgement of these uncontradicted facts, the instant opinion fails to take any action to rectify this grave miscarriage of justice, thereby compelling this Court's intervention.

Once Petitioners discovered that no order existed extending the term of the Grand Jury which indicted them, Petitioners immediately moved for entry of a writ of *habeas corpus* to obtain their release from custody on the grounds that they were being held pursuant to an invalid indictment. In response to this motion, the Government informed both District Court Judge Holderman and Petitioners that it was seeking to locate existing records documenting the Grand Jury's extension. App. 17. Instead, the Government

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[7] Although at least three grand juries were not properly extended, only the Special October 1984 Grand Jury is at issue here. Many of the indictees had already had their criminal charges resolved by trial or plea.

engaged in an unconstitutional course of action calculated to mislead the district court and to deny Petitioners the most fundamental of due process rights.

The Government approached former Chief Judge McGarr *ex parte*, without notice to either opposing counsel or Judge Holderman, and presented Judge McGarr with a *nunc pro tunc* "order" it had already written.[8] The Government's "order" purported to be Judge McGarr's own work product and made findings of fact based on Judge McGarr's purported personal recollections and the recollections of some grand jurors not before Judge McGarr.[9] These "findings of fact" were nothing more than a contrived story the Government invented in an attempt to save guilty pleas, verdicts and administrative disruption in a number of cases. Judge McGarr signed the "order" while the issues it "ruled upon" were pending before Judge Holderman and at a time when Judge McGarr had no authority over grand juries and had no cases assigned to him.[10]

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[8] In *In re Wisconsin Steel Corp.*, 48 B.R. 753 (N.D. Ill. 1985), far less egregious conduct by Chief Judge Charles McCormick in a bankruptcy case caused the Seventh Circuit to censure publicly Judge McCormick in a letter that described the judge's actions as "disquieting and "shock[ing]." By failing to even acknowledge the gross impropriety of the Government's *ex parte* conduct and its attempts to mislead the district court and the Court of Appeals, the Seventh Circuit is now in the position of holding the Government to a *lower* standard of conduct in criminal cases than civil litigants in bankruptcy disputes.

[9] The full text of the *nunc pro tunc* "order" is reprinted at App. 51.

[10] Such conduct, at the least, runs clearly contrary to longstanding ethical and professional codes of conduct, *see, e.g.*, ABA Code of Judicial Conduct, Canon 3C; *In re Wisconsin Steel Corp.*, 48 Bankr. 753, 759 (N.D. Ill. 1985), and the Government's use of Judge McGarr's "order" in other cases was a matter of some outrage at the district court level. *See, e.g., United States v. Lytle,*

(Footnote continued on following page)

The Government then presented the McGarr *nunc pro tunc* order to Judge Holderman as the sole piece of "evidence" in support of the Government's contention that the Grand Jury had been properly extended. App. 55. Upon receipt of the "order," and without knowledge of the details of its origin, Judge Holderman found the "order" to be a valid judicial order and fully binding upon him. App. 26, 34. Thus, he dismissed Petitioners' motion, denied all requests for an evidentiary hearing on the matter and ruled that any factual findings regarding the Grand Jury's validity were unnecessary. App. 42-43. The Government had thus succeeded in its effort to preclude any examination of the true facts surrounding both the purported extension of the Grand Jury and the Government's "remedial" efforts.

This is precisely the result which Petitioners' counsel sought to avoid by writing to Judge McGarr on March 9, 1987 and informing him (a) that the matter involved contested issues of fact pending before Judge Holderman, (b) that Judge McGarr was without jurisdiction to rule on the matter, and (c) that Petitioners demanded to be heard if Judge McGarr contemplated taking any action. App. 60. Nonetheless, Judge McGarr not only entered his "order" without Petitioners' participation, but also, upon receipt of counsel's letter, *reconsidered* the matter and again denied Petitioners an opportunity to participate. App. 63. Judge McGarr and the Government deliberately excluded Petitioners from the process through which the dispositive "order" was obtained and denied Petitioners any opportunity to challenge the ghostwritten recitations and conclusions it contained. In effect, the Government, through

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[10] *continued*
658 F.Supp. 1321, 1326 (N.D. Ill. 1987) ("*Nunc pro tunc* orders are not some Orwellian vehicle for revisionist history—creating 'facts' that never occurred in fact").

Judge McGarr, ruled on Petitioners' motion to dismiss pending before Judge Holderman.

The Seventh Circuit disagreed with Judge Holderman's finding that Judge McGarr's *nunc pro tunc* "order" was a valid and binding judicial order, determining instead that, as a matter of law, it was not a legal order and that its only value was "evidentiary." *United States v. Daniels*, 902 F.2d 1238, 1240-41 (7th Cir. 1990), App. 3. Instead of remanding the case to Judge Holderman for an evidentiary hearing, however, the Seventh Circuit concluded that there was no need to remand because there is a presumption of judicial integrity and it could therefore guess the outcome of a hearing. *Daniels*, 902 F.2d at 1242, App. 6-7.

Such appellate fact-finding directly conflicts with this Court's repeated emphasis on the division of roles between trial and appellate courts in the federal system.[11] The Seventh Circuit ignored the clear precedents in both this Court and the circuits[12] by making an evidentiary finding in the absence of *any* findings of fact at the district court level.

Once the Seventh Circuit had reversed Judge Holderman's holding that the *nunc pro tunc* "order" was valid and binding, the clear course for the appellate court was to remand to the district court for an evidentiary hearing on the validity of the grand jury extension that the "order" precluded. Instead, the Court of Appeals took it upon

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[11] *See Amadeo v. Zant*, 486 U.S. 214, 228 (1988); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *Pullman-Standard v. Swint*, 456 U.S. 273, 291-93 (1982); *DeMarco v. United States*, 415 U.S. 449, 450 (1974).

[12] *See, e.g., In re Grand Jury Proceedings*, 857 F.2d 707, 709 (10th Cir. 1988); *Nemmers v. United States*, 795 F.2d 628, 632-33 (7th Cir. 1986); *Cuthbertson v. Biggers Bros., Inc.*, 702 F.2d 454, 465 (4th Cir. 1983); *Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers*, 568 F.2d 558, 568 (8th Cir. 1977).

itself to rule on the validity of the extension of the Grand Jury without the benefit of *any* hearing in which evidence on this issue should have been first presented and evaluated by the district court. *See Daniels*, 902 F.2d at 1242, App. 6-7. Moreover, the Seventh Circuit was very selective about the facts it reviewed. Only the ghostwritten statements[13] contained in Judge McGarr's order were considered by the Seventh Circuit in making its factual determination. *See Daniels*, 902 F.2d at 1241-42, App. 4-7.

The Seventh Circuit completely ignored the Grand Jury transcripts, which clearly show that the factual recitations in the "order" are false. For example, the "order" states that "members of the Special October 1984 Grand Jury recall that they appeared before this Court in March 1986, and that at that time this Court extended the grand jury's term of service." App. 51-52. As the transcripts of all the Grand Jury appearances before Judge McGarr in March 1986 demonstrate, this unsupported allegation is absolutely untrue. App. 67-72. Moreover, although Petitioners were denied any discovery below, Petitioners have evidence indicating that the Government deliberately failed to inform Judge McGarr that the vast majority of grand jurors had absolutely no such recollection.[14]

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[13] Such ghostwritten statements are inherently unreliable. *See, e.g., In re Colony Square Co.*, 819 F.2d 272, 275 (11th Cir. 1987), (citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985)) (when an interested party is permitted to draft a judicial order without response by or notice to the opposing side, the temptation to overreach and exaggerate is overwhelming); *Industrial Bldg. Materials. v. Interchemical Corp.*, 437 F.2d 1336, 1339 (9th Cir. 1970) (citing *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 n.4 (1964)) (findings and conclusions prepared by non-objective advocate do not fully and accurately reflect the thoughts entertained by the impartial judge at the time of his initial decision).

[14] Such suppression of evidence is inherently suspect and highlights the dangers inherent in *ex parte* judicial proceedings. *See Brady v. Maryland*, 373 U.S. 83, 86-88 (1963).

The Seventh Circuit plainly violated its function as an appellate court when it presumed that the outcome of any evidentiary hearing would be "entirely predictable." *Daniels*, 902 F.2d at 1242, App. 7. Worse, it based this finding on the very misrepresentations contained in the *nunc pro tunc* "order" written by the Government. The Seventh Circuit then justifies its finding on the general assumption that "judges are . . . honest". *Daniels*, 902 F.2d at 1242, App. 7.

Several circuits have explicitly rejected such presumptions of judicial infallibility. In *United States v. Marr*, 856 F.2d 1471 (10th Cir. 1988), the Tenth Circuit held that "[w]here a record is available which would support or contradict a defendant's factual challenge to his conviction, the district court judge cannot rely solely on his own recollection of events to rule on the merits." 856 F.2d at 1472 (quoting *United States v. Scully*, 798 F.2d 411 (10th Cir. 1986)). In this case, the record of what actually transpired is not only available, but Petitioners' repeated attempts to present it for consideration have been rebuffed.

In *Tyler v. Swenson*, 427 F.2d 412 (8th Cir. 1970), the Eighth Circuit also expressed concerns about the presumed validity of judges' recollections in the absence of an evidentiary hearing, stating that

> [a] member of the judiciary has no peculiar competence in factual recollection of unrecorded events. In fact, the many cases a trial judge participates in may well cloud vivid recollection of detail in a specific case. A party should be permitted to test a judge's recollection, as a witness presenting factual material testimony, as he would any other witness upon cross-examination.

427 F.2d at 415.

Here, Petitioner attempted to present considerable evidence of just the sort suggested in *Tyler*, including the

following facts: (1) the Government, not Judge McGarr, wrote the "order's" recital of the "judge's" recollections and the recollections of a few grand jurors; (2) Judge McGarr's purported recollections in March 1987 recounted events that occurred a *full year* earlier at a time when there were twelve to fifteen grand juries appearing before Judge McGarr; and (3) Judge McGarr signed two *other* orders pertaining to two *different* grand juries that recite findings nearly identical to those contained in the "order" involved here.

Further, it is clear that the Government presented Judge McGarr not with an unbiased view of all the evidence, but with only the evidence the Government wanted him to see. For example, at the time he signed the *nunc pro tunc* "order," Judge McGarr had not been presented with the transcripts which establish, in direct contradiction of the language of the "order," that the Court did not extend the Grand Jury's term of service in March 1986. The transcripts of the Special October 1984 Grand Jury's appearances before Judge McGarr on March 11, 1986, March 18, 1986, and April 1, 1986 were not even prepared by the court reporter until several months *after* the date of the *nunc pro tunc* "order." *See* App. 67-72. These transcripts clearly constitute the best evidence of what occurred.

In any event, the Seventh Circuit's focus on the quality of Judge McGarr's recollection completely misses the mark. The issue here is *what actually happened.* The plain fact is that there has never been a factual record in the District Court or the Court of Appeals regarding the circumstances of the purported Grand Jury extension or the Government's efforts to create the impression that there was such an extension. Such a fundamental denial of Petitioners' due process rights constitutes an abuse of jurisdiction demanding redress by this Court.

II.

The Seventh Circuit's interpretation of 18 U.S.C. §3331 to permit extension of a special grand jury based not on a court order, but solely on the disputed and uncommunicated mental determination of an individual judge, violates the language and procedural protections of the statute.

The Grand Jury which indicted Petitioners was convened under the authority of 18 U.S.C. §3331, the statute which contains the summoning and term provisions of special grand juries. Section 3331 states, in pertinent part, that "[i]f, at the end of [its initial eighteen month] term . . . , the district court determines the business of the grand jury has not been completed, the court *may enter an order* extending such term for an additional period of six months." 18 U.S.C. §3331(a) (emphasis added). Thus, the plain language of §3331 clearly calls for the entry of an order as a prerequisite to the valid extension of a special grand jury.

Despite this language, the Seventh Circuit held, in an earlier case, that "the §3331 extension provision requires only a judicial determination that a special grand jury has not finished its business" and that "the failure to enter formal written orders of extension was not error" which rendered invalid the indictments returned by the Special October 1984 Grand Jury after its term expired on April 1, 1986. *United States v. Taylor*, 841 F.2d 1300, 1302 (7th Cir.), *cert. denied sub nom. Rosenstein v. United States*, 487 U.S. 1236 (1988). In response to the Petitioners' appeal in the instant case, the Seventh Circuit conceded that "[a] judge does not make an order, formal or informal, written or oral, when he decides, without telling anybody, that he has determined that the grand jury has unfinished business." *Daniels*, 902 F.2d at 1242, App. 6. Nevertheless, the appellate court expanded its holding in *Taylor* by per-

mitting a judge's "*uncommunicated* determination that the life of the grand jury should be extended" to have exactly same force and effect as if the judge *had* in fact entered a formal written order. *Daniels*, 902 F.2d at 1240, 1242, App. 26 (emphasis added).

A plain reading of §3331(a) makes clear that the extension process involves two distinct steps. A judicial determination that a grand jury has unfinished business is merely a condition which must be met before the district court can decide whether to enter an extension order. *See United States v. Gillespie*, 666 F. Supp. 1137, 1138 (N.D. Ill. 1987). As one judge has observed, the phrasing of §3331(a) "leads inexorably to the conclusion that, once the district judge determines that the grand jury has more work to do, he still has the option of *either* entering an order to extend the grand jury's term, *or not*." *United States v. Karalis*, 682 F. Supp. 954, 955 (N.D. Ill. 1988) (emphasis original).[15] The wording of the statute allows for discretion by a court which might be presented with countervailing factors that convince it to decline to order an extension of such a grand jury. It is the *order*, not the judge's mental determination, which is the operative judicial act.

This logical reading of subsection (a) of §3331 is given further support by the alternative extension provision authorized in subsection (b) of the statute. That subsection allows a grand jury to act independently by voting to extend a term which the district court declined to extend.

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[15] Although the district court in *United States v. Karalis*, 682 F. Supp. 954 (N.D. Ill. 1988), considered itself bound by the Seventh Circuit's holding in *United States v. Taylor*, the court felt compelled to "register its discomfiture with the *Taylor* opinion" which, in that court's opinion, interprets §3331(a) so as to "read out half of the prerequisites established by Congress for a proper extension of the grand jury's term." *Id.* at 954.

In pertinent part, the subsection provides that if the district court

> fails to extend the term of a special grand jury . . . the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit *for an order* for the continuance of the term of the grand jury. Upon the making of such application by the grand jury, the term thereof shall continue until the *entry* upon such application by the chief judge of the circuit of an appropriate *order*.

18 U.S.C. §3331(b) (emphasis added).

Subsection (b) obviously protects a grand jury with unfinished business from the possibility that a district court will arbitrarily refuse to extend its term by allowing the grand jury itself to obtain an extension order. However, the presence of this subsection is superfluous if subsection (a) was meant to be construed as automatically extending a grand jury whose business has not been completed. Subsection (b) also reiterates the importance of an extension *order*. It provides that after a grand jury votes to extend itself it may apply "to the chief judge of the circuit for an *order* for the continuance of the term . . ." 18 U.S.C. §3331(b) (emphasis added). It is logically inconsistent to assume that a judicial determination of unfinished business creates an automatic extension under subsection (a), while a grand jury's vote to extend itself still requires the entry of an extension order. Further, by stating that the grand jury may appeal the district judge's "failure to extend" the grand jury, rather than stating that the grand jury may appeal the district judge's "failure to find that the grand jury has completed its business," §3331(b) confirms that the mere judicial *finding* is not synonymous with proper *extension* of the term of a special grand jury.

Both the judicial determination of §3331(a) and the grand jury vote of §3331(b) are simply *prerequisites* for an order

extending a §3331 grand jury. Neither of these prerequisites is, by itself, an independent judicial act capable of extending an expired grand jury. Nevertheless, the Seventh Circuit's opinion in this case elevates the district judge's uncommunicated thought processes to the level of official judicial action.

The Seventh Circuit's interpretation of §3331 also ignores Rule 55 of the Federal Rules of Criminal Procedure, which requires that *each* order and judgment made by a federal judge be reduced to writing and entered into the court records. The very existence of Rule 55 demonstrates the importance that the federal courts place on a routine, objective, and verifiable written recording system. Rule 55 allows no exceptions.

The Seventh Circuit's holding that 18 U.S.C. §3331 does not require entry of an order stands in direct conflict with Rule 55. The integrity of the rule has been eroded by the Seventh Circuit's arbitrary creation of an exception to the scrupulous record-keeping requirements in criminal cases. It is wrong to allow this exception to stand when it defies *both* Rule 55 *and* the express requirements of 18 U.S.C. §3331.

Faced with conflicting decisions in the trial courts and motivated by an intention to "resolve what has became known in the Northern District of Illinois as the 'grand jury issue'," [16] *Taylor*, 841 F.2d at 1301, the Seventh Circuit in *United States v. Taylor* produced a result-oriented interpretation of Section 3331 which violates both the plain

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[16] Anton Valukas, the U.S. Attorney for the Northern District of Illinois at the time, has stated that his embarrassment over the "grand jury issue" was such that he was prepared to resign his office had the Seventh Circuit ruled against the Government and caused 200 convictions to be overturned. Levis & Weir, *The "Tough Tony" Years: Tackling White Collar Crime*, Chicago Lawyer, Jan. 1990, at 52.

language of that statute and the notion of a government constrained by a rule of law. This interpretation of Section 3331 has now taken an even more absurd twist with the Seventh Circuit's decision in the instant case. In this case, the Seventh Circuit for the first time[17] has conceded that no oral or written order now exists and that no order of any kind *ever* existed to extend the term of the Special October 1984 Grand Jury beyond its initial term. *Daniels*, 902 F.2d at 1240-41, App. 2-3. Further, by allowing a judge's uncommunicated mental determination to suffice as an order, the instant opinion has abolished *Taylor*'s requirement of "reliable and unequivocal evidence" to show that a timely extension was made. *Taylor*, 841 F.2d at 1308.

As a consequence of the Seventh Circuit's decision, a district judge overseeing a grand jury may now decide at any time, anywhere, that a grand jury's business is not yet finished, and that grand jury will instantly and automatically be validly extended. The judge's unshared mental determination will be given the force of an order, despite the fact that no record of his thoughts will exist and that no one will know of them.

This approach creates innumerable difficulties regarding compliance with §3331 and cripples the protections afforded criminal defendants by the Fifth Amendment to the U.S.

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[17] In *United States v. Taylor*, 841 F.2d at 1304, the Seventh Circuit presumed the validity of Judge McGarr's *nunc pro tunc* "corrective" order of March 3, 1987. Until the Seventh Circuit's decision in the instant case, the appellate court repeatedly invoked the *nunc pro tunc* order to "settle" the grand jury matter. *See, e.g., United States v. Rivera*, 855 F.2d 420, 423 (7th Cir. 1988). In this case, the Seventh Circuit was finally forced to admit that Judge McGarr's order was "not really an order" when confronted with Petitioner's argument that then-Senior Judge McGarr was absolutely without jurisdiction and that the Government wrote the order. *United States v. Daniels*, 902 F.2d 1238, 1240 (7th Cir. 1990), App. 3.

Constitution.[18] Precise time limits and other formal constraints are placed on special grand juries, and §3331 contains very specific time limitations for both the initial term and any extensions of that term. If a judge's uncommunicated thoughts instantly become law, it will be impossible to determine when a court has taken judicial action and impossible to calculate the beginning or end of an extended grand jury term. Heavy burdens will be placed upon a single judge's ability to perfectly recall the particular moment at which he determined that a grand jury had further business to complete. Even assuming complete judicial integrity, judges are human. The validity of judicial decisions should not depend on the memory and survival of individual judges. If a judge dies, his decision to extend a grand jury should not die with him. The characteristics of fairness, accuracy and equal treatment which support the judicial process depend upon a written, objective record.[19]

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[18] This Court recently has noted the basic constitutional rights implicated when either the grand jury or the indictment is tainted. *See Midland Asphalt Corp. v. United States*, 109 S.Ct. 1494 (1989). The necessity of obtaining an indictment from a grand jury has been considered indispensable to the exercise of jurisdiction by the federal courts since the beginning of the Republic. *See, e.g., Smith v. United States*, 360 U.S. 1 (1959); *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884); *Ex Parte Bain*, 121 U.S. 1, 12-13 (1887).

[19] This case provides an example of the kind of outrageous outcome compelled by the Seventh Circuit's holding that the record of a grand jury's extension can reside solely within the mind of an individual judge. Here, the Seventh Circuit refused to allow inquiry into the truth of a version of the chief judge's "recollections," contrived by the Government and presented surreptitiously to the judge for his signature, despite the fact that the *written* transcripts of the actual grand jury proceedings clearly demonstrate that the Government's version of the judge's recollections is false. *See supra* at 8 n.5, 15-16.

Further, it is imperative that grand juries strictly adhere to the terms of the statutes which authorize them. As a "creature of statute," *United States v. Fein*, 504 F.2d 1170, 1172 (2d Cir. 1974) (quoting *In re Mills*, 135 U.S. 263, 267 (1890)), a grand jury acquires power only through compliance with the terms of its governing statute. Without the authority granted to it by such a statute, a grand jury has no power to act. *United States v. Bolton*, 893 F.2d 894 (7th Cir. 1990) (per curiam); *United States v. Armored Transport, Inc.*, 629 F.2d 1313, 1316 (9th Cir. 1980). In particular, the statutory provisions which govern the length of a grand jury's service, and any extensions thereof, must be scrupulously followed. *See, e.g., United States v. Lang*, 664 F.2d 1232, 1235 (7th Cir.), *cert. denied*, 454 U.S. 870 (1981) (citing *United States v. Macklin*, 523 F.2d 193 (2nd Cir. 1975)). By injecting an element of uncertainty and confusion into a grand jury statute which is clear on its face, the Seventh Circuit has shifted the focus of jurisprudence in the area of grand jury jurisdiction away from the production of a verifiable record, abrogated the very procedural protections the grand jury statute was designed to implement, and seriously undermined basic constitutional rights guaranteed to criminal defendants by the Fifth Amendment.

III.

The Seventh Circuit erred in expanding the "ordinary course of duty" exception to Title III's warrant requirement in direct conflict with other courts of appeals.

In affirming the district court's dismissal of Petitioners' motion to suppress the FBI's wiretap evidence of Petitioner Daniels' telephone conversations from the Metropolitan Correctional Center ("M.C.C."), the Seventh Circuit departed from its own earlier holdings and created a conflict with several other circuits. The Seventh Cir-

cuit upheld an electronic surveillance order based on earlier, unauthorized M.C.C. wiretaps by invoking the exception to Title III's order requirement[20] for surveillance by officers "in the ordinary course" of duty. In doing so, however, the Seventh Circuit not only failed to make the requisite determination that the M.C.C.'s monitoring of Daniels' telephone conversations was a routine and random exercise of prison security, but ignored the evidence showing that the M.C.C.'s surveillance of Daniels was both exceptional and focused.

Section 2515 of Title 18 prohibits the use of intercepted communications, or *evidence derived therefrom*, as evidence in any proceeding. Title III, however, exempts any telephone or other instrument "being used by a . . . law enforcement officer in the ordinary course of his duties." 18 U.S.C. §2510(5)(a)(ii). Every circuit that has addressed the issue of monitoring prison telephone calls under this exception, including, prior to the instant decision, the Seventh Circuit, has held that the such monitoring must be routine and random in order to fall within the exception. *United States v. Sababu*, 891 F.2d 1300 (7th Cir. 1989); *United States v. Feekes*, 879 F.2d 1562 (7th Cir. 1989); *United States v. Paul*, 614 F.2d 115 (6th Cir. 1980); *Campiti v. Walonis*, 611 F.2d 387 (1st Cir. 1979).

The routine and random requirement has been applied to Title III's telephone monitoring exception to insure that unauthorized electronic surveillance occurs only to prevent a breach of prison security. In *United States v. Paul*, *supra*, the Sixth Circuit upheld the use at trial of a prisoner telephone call monitored in accordance with prison rules, which routed all prisoner telephone calls through

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[20] Title III of the Omnibus Crime Control Act, 18 U.S.C. §§2510-2521.

the prison switchboard for random monitoring. 614 F.2d at 116. Further, the goal of prison security was served because the information obtained from monitoring the call prevented the unlawful introduction of drugs into the facility. *Id.* The "ordinary course of duty" exception therefore properly allowed the use of the evidence obtained through the intercepted telephone call.

When prison officials selectively monitor the telephone calls of a specific prisoner with the purpose of obtaining evidence to be used in pending criminal proceedings, however, it cannot be said that the monitoring is either "routine" or "random." The "ordinary course" exception is therefore be inapplicable. In *Campiti v. Walonis*, 611 F.2d 337 (1st Cir. 1979), for example, a prisoner's telephone call to a sheriff who was under investigation was purposefully monitored by prison officials and used in a report on wrongdoing by the sheriff. In an action the prisoner subsequently brought against the officers who monitored his telephone call, the First Circuit determined that the "ordinary course" exception could not apply because the call in issue was not randomly monitored. Even though the prison routinely monitored prisoner telephone calls, prison officers deliberately eavesdropped on this call to gather evidence for use in their investigation, which also had no bearing on prison security. *Id.* at 392. The interception in *Campiti*, just as the interception in the instant case, therefore was not made pursuant to general prison policy regarding routine, random telephone monitoring, but was directed to the specific monitored telephone call as part of a focused investigation. *See United States v. Cohen*, 796 F.2d 20 (2d Cir. 1986) (prison officer may not engage in purely investigative activities and circumvent the Fourth Amendment's warrant requirement by claiming he was acting in the ordinary course of his duties).

The Seventh Circuit's instant opinion, however, totally disregards the "routine and random" limitations on the "ordinary course of duty" exception. The Seventh Circuit's one paragraph analysis of the exception is a mere *ipse dixit*: the lower court invokes the language of the exception, and then simply states that the FBI's monitoring was in their ordinary course of duty. The decision states no authority or fact in support of this conclusion. Rather, the monitoring was in the ordinary course only because the opinion claims it was so.[21]

While the instant opinion cites Seventh Circuit cases for the "ordinary course" exception, it fails to state what these precedents make clear: only random and routine monitoring of prisoner calls undertaken for the purpose of maintaining prison security is permitted. *See United States v. Sababu*, 891 F.2d 1308, 1329 (7th Cir. 1989); *United States v. Feekes*, 879 F.2d 1562, 1566 (7th Cir. 1989). The instant opinion simply ignores the analysis which the Seventh Circuit, and other circuits faced with this issue, have relied upon to determine whether the "ordinary course" exception should apply.

The Seventh Circuit's failure to even address the requirements for applying this exception conceals the factual record, which shows that the M.C.C.'s monitoring of Petitioner Daniels' telephone conversations was anything but routine or random. For example, the record shows that, although Daniels was incarcerated on April 15, 1985, none of his telephone calls were monitored until the first week of July 1985. R. 260, Ex. E. In July and August, however, M.C.C. officers provided the FBI with 17 hour-

[21] The "ordinary course of duty" issue was not raised below since District Court Judge Holderman based his denial of Petitioner's motion to suppress solely on his finding that Petitioner Daniels "consented" to the M.C.C. wiretap. *See* App.77-78.

long cassette tapes of Daniels' telephone calls. R. 260, Exhibits A, B, C, E and G. It could hardly be random for Petitioner to spend roughly ten weeks at the M.C.C. without having *any* of his telephone calls monitored, and then suddenly have a huge number of recorded telephone conversations amassed against him in less than eight weeks.

Nor do the taped telephone calls have any bearing on prison security. As opposed to *United States v. Paul*, *supra*, where defendant attempted to smuggle drugs into prison, or *United States v. Subabu*, *supra*, where the prisoner engaged in telephone calls to arrange the purchase of weapons for an escape, Petitioner's telephone conversations concerned transactions occurring completely *outside* of the prison. The surveillance therefore went beyond preserving prison security and attempted to discover evidence for use in a criminal investigation, removing it from the ordinary course of the prison officers' duties. *See United States v. Cohen*, 796 F.2d at 23-24.

The FBI's later surveillance of Petitioner Daniels was also undisputedly an extensive investigation focused on Petitioner Daniels. Based on the earlier warrantless M.C.C. wiretap, which was used as evidence for probable cause, the FBI obtained a court order authorizing its surveillance. In obtaining the order, the FBI was clearly seeking to comply with Title III's warrant requirement, not invoke an exception to it. The instant opinion, however, ignores Petitioners' argument that the order was improper because it was based entirely on the earlier illegal interceptions—and indeed ignores the M.C.C.'s surveillance entirely—stating only that the FBI's surveillance was in the ordinary course of its duties because surveillance is one of the things that the FBI does and therefore no warrant under Title III was required. This reasoning is completely elliptical and allows the "ordinary course" exception to

swallow the warrant requirement of Title III in its entirety.

The Seventh Circuit's misinterpretation of the statute and departure from the established case law will foster confusion and inconsistent adjudication within the Seventh Circuit and between the courts of different circuits. Not only does the instant opinion abolish the routine and random requirement established by prior cases, but, given a literal reading, completely eliminates the warrant requirement of Title III for *any* investigation, as long as it is performed by an investigative agency. This result is nonsensical.

Additionally, the instant opinion thwarts Congress' intent in enacting Title III. The legislative history of Title III makes it clear that Congress intended to create a strict prohibition on *all* eavesdropping without a court order. S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2113. Moreover, this Court has recognized that Title III is a punitive statute which is to be narrowly construed in favor of the defendant. *United States v. Giordano*, 416 U.S. 505 (1974). The Seventh Circuit, however, gives the "ordinary course of duty" language a liberal reading in favor of warrantless surveillance, directly contrary to the statutory intention. S. Rep. No. 1097, *reprinted in* 1968 U.S. Code Cong. & Admin. News at 2113. The Seventh Circuit's reading of §2510(5)(a)(ii) is so broad that it completely consumes the prohibition against warrantless eavesdropping.

Finally, the Seventh Circuit's cavalier treatment of this issue merits attention. Telephone conversations intercepted by the M.C.C.'s warrantless wiretap were used to establish probable cause for the court's later authorization of the FBI's surveillance so that the subsequent monitoring by the FBI pursuant to that order was not valid unless the

M.C.C.'s surveillance was lawful. *See* 18 U.S.C. §2515. The Seventh Circuit's holding, however, completely fails to address the M.C.C.'s surveillance and thereby clearly fails to address this fundamental point of Petitioners' motion to suppress. Instead, the Seventh Circuit summarily makes what is essentially a *de novo* factual finding—that the FBI was engaged in the ordinary course of its duties—on a matter that was never even addressed by the district court, and which is completely contradicted by the evidence that does exist in the record. Basic notions of fairness, and, in this case, notions of privacy embraced by Congress in Title III, should not bend to justify this result. The Seventh Circuit's holding, bereft of any legal analysis and based only on a single conclusory statement, can only be viewed as a result-oriented misreading of the law. This Court must act to correct an injustice that will only be compounded over time if left to stand.

CONCLUSION

For these reasons, this petition for *certiorari* should be granted.

Respectfully submitted,

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90-430

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROOSEVELT DANIELS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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ROOSEVELT DANIELS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES of America,
Plaintiff-Appellee,

v.

Roosevelt DANIELS, et al.,
Defendants-Appellants.

Nos. 89-2014, 89-2015, 89-2017, 89-2025 and 89-3176.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 18, 1990.

Decided May 10, 1990.

Rehearing and Rehearing En Banc
Denied June 11, 1990.

* * * * *

Before CUMMINGS, POSNER, and MANION, Circuit Judges.

POSNER, Circuit Judge.

The five defendants whose appeals we have consolidated were charged with large-scale federal drug offenses orchestrated by defendant Daniels, in part through telephone calls to the other defendants from the Metropolitan Correctional Center in Chicago, where he was awaiting trial for his drug activities. The evidence of guilt being overwhelming, the defendants pleaded guilty, reserving however several issues for appeal. Later they moved to set aside their guilty pleas, but Judge Holderman denied the motion and in 1989 sentenced the defendants to prison for terms ranging up to 55 years (for Daniels). Although the sentences are exceedingly long (especially since they are not subject to parole), the defendants' offenses were brazen, far-flung, and enormously profitable.

The principal issue is the validity of the indictment. Section 3331 of the Criminal Code places an eighteen-month limit on the life of a federal grand jury, unless the district court enters an order extending it. An indictment issued by a grand jury whose term is up and has not been validly extended is void, *United States v. Bolton*, 893 F.2d 894 (7th Cir.1990) (per curiam), so like other jurisdictional rules this is a technicality with teeth. The term of the Special October 1984 Grand Jury that indicted the defendants expired on April 1, 1986, and the defendants were not indicted till August, so it is critical whether the life of the grand jury was extended. No order extending it exists but in *United States v. Taylor*, 841 F.2d 1300, 1306 (7th Cir.1988), a case involving the same grand jury, we held that it was enough that Chief Judge McGarr, who had presided over the Special October 1984 Grand Jury, had made a determination to extend it for another six months. As evidence that he had made such a determination we cited a "*nunc pro tunc*" order that he had issued on March 3, 1987, after the grand jury's term had (even if extended) expired. When, shortly after *Taylor* came down, the defendants asked us for a writ of mandamus directing Judge Holderman to dismiss the indictment because the grand jury's term had expired, we denied the writ, stating that *Taylor* "controls this case." *In re Daniels*, No. 88-1750 (7th Cir. April 25, 1988) (unpublished).

The government argues that *In re Daniels* establishes the law of this case, thus providing another reason beside *stare decisis* why we should not reexamine *Taylor*. But we are not disposed to reexamine the holding of *Taylor* in any event, the holding being only that a formal order is not necessary to extend the life of a grand jury. Although the defendants in this case disagree with that holding, the main thrust of their argument is different.

It is that the *nunc pro tunc* order is not reliable evidence of Judge McGarr's determination to extend the grand jury.

When the order was issued, not only had the grand jury's term, even if it had been extended by six months, expired, but Judge McGarr was no longer chief judge and hence was no longer presiding over grand juries. On both accounts he had no authority to extend the life of the grand jury. A judge may correct a clerical error at any time, pursuant to Rule 36 of the criminal rules, a parallel provision to the better known civil rule 60(a) of the civil rules. But he may not rewrite history. *United States v. Janik*, 723 F.2d 537, 545 (7th Cir.1983); *King v. Ionization International, Inc.*, 825 F.2d 1180, 1188 (7th Cir.1987). The significance of Judge McGarr's *nunc pro tunc* "order" (not really on order) is evidentiary, as is apparent from its wording, which speaks of Judge McGarr's recollections and intentions during the grand jury's initial eighteen-month term. In *Taylor* we were given no reason to doubt the reliability of these recollections and intentions and treated the "order" as, in effect, an unrebutted affidavit. The present defendants have submitted evidence, which Judge Holderman may have brushed aside too quickly, that the order is not reliable. The order was drafted by government lawyers and given to Judge McGarr to sign without notice to the defendants or to their lawyers. It is signed but of course not attested.

Imagine that Judge McGarr had retired before March 1987 and it became necessary to determine whether he had extended the term of the grand jury during its initial eighteen-month term. The government could not have gone to Judge McGarr and asked him for an order; a retired judge (as distinct from a judge who, having reached retirement age, remains in service as a senior judge) has

no authority to issue orders. The government would have had to ask Judge McGarr for an affidavit and the defendants would have been entitled to contest the affidavit by suitable means which might have included questioning both the grand jurors and Judge McGarr under oath. What difference should it make that Judge McGarr had not yet retired (he has retired since, and returned to the practice of law) when the government lawyers came to see him? He was no longer presiding over grand juries and had no authority to issue orders concerning them; in any event the Special October 1984 Grand Jury had disbanded and its members had dispersed.

The issue of the adequacy of Judge McGarr's order *as evidence* was not clearly presented in *Taylor*. The defendants' subsequent petition for mandamus raised it clearly enough but the issue was not a suitable one for mandamus and our remark in denying the petition that *Taylor* "controls this case" was dictum. In both of those proceedings we assumed rather than determined the reliability of the *nunc pro tunc* order as evidence of Judge McGarr's recollections and intentions. What is more, in disposing of still another futile effort by the defendants to obtain a premature determination of the issue, the same panel that had denied the petition for mandamus later reassured the defendants that their challenge to the indictment would be considered on the merits when properly raised. *United States v. Daniels*, 848 F.2d 758, 760 (7th Cir.1988). There was no suggestion that the law of the case doctrine would prevent such consideration.

We did say in *Taylor* that we were examining Judge McGarr's order to determine whether "it contains evidence" that the judge had made the requisite determination to extend the grand jury's life, and that "this evidence [the order, plus the fact that the grand jury had

voted to extend itself] suffices to show that the [Special October] 1984 Grand Jury was properly extended for six months." 841 F.2d at 1308-09. But the word "evidence" was not used with its technical legal meaning. The ex parte character of the order and the fact that Judge McGarr was no longer chief judge when he signed it should have been evident but they were not discussed and their significance was not grasped. The order's adequacy as evidence was, in short, not confronted. Judicial assumptions concerning, judicial allusions to, and judicial discussions of issues that are not contested are not holdings. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119, 104 S.Ct. 900, 918, 79 L.Ed.2d 67 (1984); *Hagans v. Lavine*, 415 U.S. 528, 533 n. 5, 94 S.Ct. 1372, 1377 n. 5, 39 L.Ed.2d 577 (1974); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 459-62, 98 S.Ct. 2441, 2449-51, 57 L.Ed.2d 337 (1978); *United States v. House*, 808 F.2d 508, 511 (7th Cir.1986); *Glidden v. Chromalloy American Corp.*, 808 F.2d 621, 625 (7th Cir.1986); *Zbaraz v. Hartigan*, 763 F.2d 1532, 1544-45 (7th Cir.1985). The holding of *Taylor* is simply that the absence of an order entered before the initial term of the grand jury had expired was not a fatal defect invalidating the indictment. That holding would not be impaired by a conclusion based on the different record and arguments in the present case that the evidentiary foundations for the finding that the grand jury was in fact extended are too wobbly to permit the matter to rest.

Taylor refers repeatedly to Judge McGarr's "determination," made during the life of the grand jury though memorialized afterward, to extend that life. Another name for "determination" is, it might seem, "order," making the failure to memorialize it in a writing the kind of clerical oversight that can be corrected (without notice) under

Rule 60(a) of the civil rules or, as here, Rule 36 of the criminal rules. Such a correction can be made, in the words of Rule 36, "by the court at any time." Judge McGarr was a judge of the district court when he made the correction, and the proper member of a court to correct an oversight is the judge who committed the oversight in the first place. Since Rule 36 empowers the judge to act on his own initiative, the fact that the oversight was drawn to his attention by an ex parte submission of one of the parties would not invalidate the corrective order.

Unfortunately there is no way in which Judge McGarr's "determination" to extend the life of the grand jury can be deemed an "order." Not only does *Taylor* deny the possibility of such a characterization, 841 F.2d at 1306, but an order is a public act, not an internal mental act. A judge does not make an order, formal or informal, written or oral, when he decides, without telling anybody, that he has determined that the grand jury has unfinished business. The failure to announce his determination may be an oversight but it is not an oversight in an order, judgment, or any other part of the record, and it therefore cannot be corrected under Rule 36.

It is a question of fact whether Judge McGarr was mistaken in his recollection of having made an uncommunicated determination that the life of the grand jury should be extended. For obvious reasons, disputes over judicial recollection are not customarily resolved by placing the judge on the witness stand. The issue has arisen in cases where a judge is asked to vacate a criminal defendant's sentence on the ground that the presentence report contains false information, and he denies the motion on the ground that he did not rely on the information in deciding what sentence to give. We have upheld these denials even

though the judge was not subjected to the fires of cross-examination. *Johnson v. United States*, 805 F.2d 1284, 1289 (7th Cir.1986); *Blake v. United States*, 841 F.2d 203, 207 n.3 (7th Cir.1988); *United States v. Montoya*, 891 F.2d 1273, 1280 (7th Cir.1989); see also *United States v. Baron*, 860 F.2d 911, 919-20 (9th Cir.1988); but see *United States v. Fernandez-Angulo*, 897 F.2d 1514 (9th Cir.1990) (en banc). We assume that our judges are not only honest but also not unduly suggestible, and therefore that Judge McGarr would not have signed an order stating that he recalled extending the grand jury unless he accurately recalled having done so. (Chief Judge Grady, who succeeded Judge McGarr as chief judge, recalled *not* having extended a grand jury that handed down an indictment after the expiration of its eighteen-month term, and the result was the dismissal of the indictment. *United States v. Clemenic*, 886 F.2d 332 (7th Cir.1989), published as an appendix to *United States v. Bolton*, *supra*, 893 F.2d at 896-901.) It was not a recollection about the remote past, compare *Krist v. Eli Lilly & Co.*, 897 F.2d 293 (7th Cir.1990), and it was consistent with the fact that the grand jury had voted to extend its term. There can be no serious doubt about what Chief Judge McGarr would have done had he been asked in timely fashion to issue an order extending the life of the grand jury. The "evidentiary hearing" conducted in this case to determine Judge McGarr's recollection was unsatisfactory, for the reasons we have indicated, but we do not think it was so defective that we should remand for a further hearing at which Judge McGarr would be placed under oath, examined, and cross-examined—with results entirely predictable.

Although we conclude that the indictment in this case was valid, we are greatly distressed at the amount of judicial time that has been consumed by this snafu, the

result of the failure of the United States Attorney for the Northern District of Illinois to keep track of his grand juries. We trust that steps will be taken to prevent a recurrence of such negligence.

Several issues raised by Daniels alone also merit discussion. First, he argues that he was coerced into pleading guilty by promises that he would get a lighter sentence and also that he would be let out of solitary confinement at the Metropolitan Correctional Center, where he was being held to prevent him from continuing to conduct his drug ring from jail. There is no evidence of the latter promise beyond the fact that, shortly after Daniels pleaded guilty, he was indeed let out of solitary confinement. This could have been a coincidence, and it did not require Judge Holderman to find, in the absence of any other evidence, that the plea had been coerced.

Regarding the promise of leniency in sentencing, Daniels stresses Judge Holderman's statements during the guilty-plea hearing that "I give substantial weight . . . if a defendant who is guilty is willing to admit that to himself and to other people around him and to me" and "substantial consideration to people who believe they are guilty [when they] admit it," and his interrupting the hearing to sentence a defendant in an unrelated case who had pleaded guilty. The judge told everyone in the courtroom (thus including Daniels) to pay close attention to that sentencing, then told the defendant in the unrelated case that he always takes a guilty plea into account in sentencing and proceeded to sentence him to probation. Daniels argues that by staging this little show of compensated contrition Judge Holderman led him to expect that if he pleaded guilty he would get off with a sentence a lot shorter than 55 years. The government replies that had Daniels not pleaded guilty, Judge Holderman might well have sen-

tenced him to life in prison without parole. The government points out that, with time off for good behavior, Daniels can expect to be released in the year 2024, when he will be "only" 73 years old. In fact his life will have been ruined.

A plea bargain is a contract. If the government, or the judge, breaks the contract, the defendant must be allowed to withdraw his plea. *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971); *United States v. O'Brien*, 853 F.2d 522, 525-26 (7th Cir.1988); *United States v. Strawser*, 739 F.2d 1226, 1229 (7th Cir. 1984); *Brooks v. United States*, 708 F.2d 1280 (7th Cir. 1983). And no more than in ordinary contract law need a promise in a plea negotiation be express in order to bind. *United States v. O'Brien*, *supra*, 853 F.2d at 526; *United States v. Bowler*, 585 F.2d 851, 854 (7th Cir.1978). But the content of the promise is a question of fact, *United States v. Strawser*, *supra*, 739 F.2d at 1229; *United States v. Fields*, 766 F.2d 1161, 1168 (7th Cir.1985), and we cannot say that Judge Holderman made a clear error in determining that he had not broken any promise of leniency. Daniels could not expect Judge Holderman to give him probation if he pleaded guilty. The only promise reasonably to be inferred from the judge's statements and conduct was that Daniels would receive an undefined amount of consideration if he pleaded guilty—enough consideration to avoid a sentence of imprisonment for his natural life, for that was the maximum sentence, but beyond that he was throwing himself on the judge's mercy. If he stood trial, as was his right, almost certainly he would not only be convicted but also be sentenced to life imprisonment without possibility of parole, and it must have seemed preferable to him to gamble on Judge Holderman's generosity. That he was disappointed does not establish a breach of contract.

We are troubled that Judge Holderman should be the official deputed to determine whether Judge Holderman broke his promise to the defendant. It seems to make him a judge in his own cause. But that is not the view that our legal system takes of such cases. A defendant who wants to withdraw his guilty plea before sentencing must address his motion in the first instance to the judge who accepted the plea (unless the judge has died or retired or recused himself), for that is the judge in the case. After sentencing, if you want to withdraw your guilty plea you must return to the sentencing court, 28 U.S.C. § 2255, and as a practical matter that means the sentencing judge. These are just two illustrations, although highly pertinent ones, of the point that our legal system often empowers a judge to decide, subject only to deferential appellate review, whether a previous ruling by him was in error. The procedure is not a denial of due process. Even though most judges, like most anyone, are reluctant (if only unconsciously) to acknowledge their mistakes, judges are not interested parties in the sense of having a monetary interest in the outcome of their rulings or a familial or other close relationship with a party or a lawyer in the case. We do not allow trial judges to sit on appeals from their cases but we do allow them to reconsider their rulings. 28 U.S.C. § 47; *Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989); *David v. Attorney General*, 699 F.2d 411, 416-17 (7th Cir.1983). A plea to withdraw a guilty plea is considered in this light. The fact that the specific determination Judge Holderman had to make was whether he had broken his promise is immaterial, for the situation would be the same if he were asked to reconsider an order denying a motion for an extension of time on the ground that he had promised the extension.

Even if there was no breach of an implied promise to Daniels he still can argue that since a promise of lenien-

cy can result in a *confession's* being adjudged coerced, *United States v. Rutledge*, 900 F.2d 1127, 1129-1130 (7th Cir.1990); *United States v. Guerrero*, 847 F.2d 1363, 1365 (9th Cir.1988); *Quartararo v. Mantello*, 715 F.Supp. 449, 460-61 (E.D.N.Y.), aff'd without opinion, 888 F.2d 126 (2d Cir.1989), the same should be true with respect to a guilty plea, which is like a confession but even more conclusive. However, the analogy between a confession and a guilty plea—expressly rejected in *Brady v. United States*, 397 U.S. 742, 754, 90 S.Ct.1463, 1472, 25 L.Ed.2d 747 (1970)—is not perfect. If it were, there could be no plea bargaining, an essential element of which is the prosecutor's implied promise of leniency if the defendant forgoes his right to put the government to the expense and uncertainty of a trial. The elaborate hearing that is required before a judge can accept a guilty plea is designed to assure that the defendant is not induced by the promise of leniency to plead guilty to a crime he did not commit. But that the promise is the inducement is taken for granted; and although this is distressing to the opponents of plea bargaining, their views have yet to move the Supreme Court or Congress. Perhaps if the promise of leniency were so extravagant that it would induce even an innocent person to plead guilty, the plea would be invalid, although *Brady* can be read to suggest not. 397 U.S. at 758, 90 S.Ct. at 1474. Suppose, fantastically, that a person accused of first-degree murder, but innocent, were offered a plea of guilty to a traffic offense. The risk of conviction of murder, even if slight, would when multiplied by the cost to the defendant of being punished if he were convicted induce many a rational but innocent defendant to plead guilty to a traffic offense; a plea in these circumstances, although entirely voluntary, would be unreliable. Even then it could be argued that the defendant would be protected by the trial judge's obligation to inquire whether

the plea has a factual basis, and that any limitation on freedom of contract deserves defendants' interests. We need not pursue the issue further, however the considerations we have listed may balance out, we were speaking in our hypothetical case of an *extravagant* promise, and there was no such promise in our actual case unless Judge Holderman was implicitly promising Daniels probation if he pleaded guilty. Not even Daniels argues that.

The last question we discuss is whether Judge Holderman should have granted the defendants' motion to suppress evidence obtained by the FBI's recording of Daniels' telephone calls from jail on the ground that it violated the federal wiretapping law. 18 U.S.C. §§ 2510 *et seq.* As in *United States v. Feekes*, 879 F.2d 1562, 1565-66 (7th Cir.1989), we need not decide whether this is a case of consent by one of the parties to the phone conversation (namely Daniels) and is therefore within the exception in 18 U.S.C. § 2511(2)(c). The government does not advance its cause with us by arguing that Daniels' consent can be inferred from a provision in the Code of Federal Regulations which says that inmates' phone calls may be monitored. That is the kind of argument that makes lawyers figures of fun to the lay community, and although a respected sister court has accepted it, *United States v. Amen*, 831 F.2d 373, 379 (2d Cir.1987), we place no weight on it. In addition, however, Daniels not only signed a form which states "I understand that telephone calls I make from institution telephones may be monitored and recorded," but also stated in one of the monitored and recorded conversations: "don't think for one minute this conversation ain't being recorded." He thought that by the use of a simple code he could prevent the eavesdroppers from understanding what he was doing. He thought wrong. This may make his case seem identical to that of a per-

son who consents to the search of his house, erroneously believing that the police will fail to do a thorough job and uncover the contraband that he has concealed in it. No law shields evidence thus obtained from use in a criminal prosecution. But knowledge and consent are not synonyms. Taking a risk is not the same thing as consenting to the consequences if the risk materializes. A person who walks by himself late at night in a dangerous neighborhood takes a risk of being robbed; he does not consent to being robbed. We would be surprised at an argument that if illegal wiretapping were widespread anyone who used a phone would have consented to its being tapped and would therefore be debarred from complaining of the illegality.

However, here as in *Feekes* the government has a good alternative ground for the admissibility of the wiretap evidence. Section 2510(5)(a)(ii) of the Criminal Code allows wiretapping "by an investigative or law enforcement officer in the ordinary course of his duties." This describes what the FBI agents were doing when listening to Daniels conduct an illegal enterprise. See also *United States v. Sababu*, 891 F.2d 1308, 1328-29 (7th Cir.1989); *United States v. Paul*, 614 F.2d 115, 117 (6th Cir.1980).

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 11, 1990

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Richard A. Posner, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge

Nos. 89-2014, 89-2015, 89-2025, 89-3176	)	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 85 CR 232 James F. Holderman, *Judge.*
UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	
ROOSEVELT DANIELS, *et al.*, Defendants-Appellants.	)	

ORDER

On May 24, 1990, defendants-appellants filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	85 CR 232
v.	)	
	)	Chicago, Illinois
ROOSEVELT DANIELS, et al.,	)	February 27, 1987
	)	11:19 a.m.
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE JAMES F. HOLDERMAN

APPEARANCES:

For the Government:	HOWARD M. PEARL Assistant U.S. Attorney
For defendant Roosevelt Daniels:	MICHAEL H. KING
For defendant Sandra Campbell:	DOUGLAS P. ROLLER

[2] THE CLERK: 85 CR 232, United States v. Roosevelt Daniels. For emergency motion.

MR. ROLLER: Good morning, your Honor. Douglas Roller on behalf of the defendant Sandra Campbell.

MR. KING: Good morning, your Honor. Michael King on behalf of Roosevelt Daniels.

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* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

MR. PEARL: Good morning, your Honor. Howard Pearl on behalf of the United States.

MR. ROLLER: I know your Honor is pressed for time. We have filed a written motion just now, emergency motion. I think it speaks for itself. Our position is quite simple.

The indictment in the present case, we believe, is invalid. The defendants are being held pursuant to an invalid indictment. They should be released.

MR. KING: Your Honor, I talked to Michael Cohen, who represents Lawrence Lee. Mr. Cohen could not be here this morning, but he has authorized me to inform you that he joins the motion on behalf of Mr. Lee.

THE COURT: All right.

Mr. Pearl?

MR. PEARL: Judge, each of these defendants in this case has pled guilty to charges returned by a lawfully constituted Grand Jury. I don't see the problem. I don't know where the evidence is that this superseding indictment was necessarily invalid.

[3] As we informed the Court yesterday and defense counsel, there is an extension order that we believe to have—we believe the Grand Jury was properly extended. We believe that the ministerial or clerical mistake is just that. We are in the process of finding out how it happened and trying to rectify it.

But, as I said, this Court clearly had jurisdiction in this case. These defendants have pled guilty to offenses charged by a lawfully—indisputably lawfully constituted Grand Jury, and, of course, a plea of guilty waives any defects in the institution of prosecution. I don't see how they get out.

MR. ROLLER: 18 U.S.C. 3331 is quite clear as to the process by which a grand jury can be extended. It requires an order of the court for each six-month extension.

The Special October 1984 Grand Jury was past its 18-month original session. There has to be a constituted grand—properly constituted grand jury, and for that grand jury to have returned a superseding indictment, an order by the Chief Judge extending them for the additional increments of six months must have been entered.

I don't think that there is any dispute that there is no such order in the Clerk's files in connection with extending that grand jury, and I do not believe, your Honor, that defendants are being held in light of an [4] indictment which was returned by a clearly invalid grand jury.

If there's no order extending, it was like bringing 26 people off the street and voting to indict.

THE COURT: Well, let me—it wasn't like bringing 26 people off the street—

MR. ROLLER: Well, I overstated. I apologize.

THE COURT: These people had previously been sworn to be grand jurors, and had served as grand jurors. But is there a dispute as to whether there's a valid order, Mr. Pearl?

MR. PEARL: There is. As I said, your Honor—

THE COURT: Mr. Roller said it wasn't disputed.

MR. PEARL: Right.

THE COURT: Is it disputed?

MR. PEARL: I think that's incorrect. As we informed the Court in writing, it's our belief that the grand jury was, in fact, extended. We are confident of that. And we are in the process of trying to document it.

THE COURT: Okay.

MR. PEARL: All we informed the Court of was that the actual—there is no actual minute order at this time that can be found in the Clerk's office.

THE COURT: All right, I am applying the—

MR. KING: Your Honor, may I—

[5] THE COURT: Yes, Mr. King? Do you have something to say?

MR. KING: Yes, sir. I know that your Honor is under time pressure, but this is a matter of great substance.

THE COURT: I will take as much time as you need, Mr. King—

MR. KING: I appreciate that.

THE COURT: —for you to address me, all right? This is in on an emergency motion. I allowed time for you to present it.

MR. KING: I appreciate that.

THE COURT: What would you like to say that Mr. Roller hasn't said?

MR. KING: Judge Shadur, in a case pending before him in which the Government was a party, ruled—

THE COURT: I'm familiar with that. Judge Shadur has kept all the judges apprised as to his positions, as well as sent us additional letters citing authority for us.

MR. KING: Without rearguing Judge Shadur's position, and I don't intend to do that to you, I believe that under appropriate rules of authority, the Government is collaterally estopped now from taking the position that the indictments returned by that grand jury are valid. Judge Shadur has ruled as a matter of law with respect to the consequences of an improper extension of the grand jury. [6] Therefore, I believe the Government, as a party to that proceeding, is collaterally estopped, and I believe that this Court is now bound by the proposition that orders and indictments returned by a grand jury which is not clearly, on its face, a validly constituted and extended grand jury are invalid.

If the indictments are invalid, your Honor, there is no basis to hold the defendants in custody.

THE COURT: Mr. Pearl, are you appealing that decision?

MR. PEARL: I can't say, but I can say two things, one, that—

THE COURT: You have got 30 days, of course, to file—

MR. PEARL: Yes, and I'm sure Mr. King, if he checked, would realize that the grand jury in the case before Judge Shadur was not the same grand jury that's involved in this case, and, second, of course, Judge Shadur doesn't bind the rest of the court.

MR. ROLLER: But the issue is the same—

THE COURT: I understand the issue is the same—

MR. PEARL: No. And there were no pleas of guilty in that case.

THE COURT: —and I am following Judge Shadur. Judge Shadur has been very conscientious in keeping all the [7] other judges apprised as to precisely what he is doing. He has provided us with materials, as he does in a number of issues that come up. Judge Shadur is of the mind, and I agree with him on this position, that we should keep one another apprised as to what our decisons are if they seem to have something that would—another judge may have to rule on. And so I'm aware of it.

But I will tell you right now there is nothing before me that would indicate that this grand jury that returned the indictment that's pending now was invalid.

MR. KING: Judge—

THE COURT: There is nothing before me.

MR. KING: The Government has told you that they are unable to demonstrate to you, standing here—

THE COURT: Mr. King—

MR. KING: —that there is jurisdictional authority for this Court.

THE COURT: Okay, thank you, Mr. King. I was aware of that, and I took that into account. The Government has told me that. But I have nothing before me to indi-

cate that this Grand Jury was invalidly constituted at the time that it returned this indictment.

MR. KING: You have the Government admission that—

THE COURT: Mr. King,—

MR. KING: You have the—

[8] THE COURT: Is there something else, some other piece of evidence that you would like to present to me?

MR. KING: Judge, yes, I want to make as complete a record as I think is appropriate.

THE COURT: Please do.

MR. KING: Thank you.

The Government has said to you that they are unable to demonstrate to you that there was a valid extension order with respect to this Grand Jury. In the absence of that, the Court is without jurisdiction, and the indictment before, which—which is pending before you and on which the defendants are being held is a nullity, it's without legal consequence.

The guilty pleas were not completed because sentences had not been imposed. It was simply an interim step in the proceedings. I believe that those pleas are all invalid. I don't address the question of what arises with respect to any defendant who has already been sentenced, whose case arguably is over with, but with respect to Mr. Daniels, it is clear that the proceedings have not been concluded, that all of his rights are preserved at this point, and that the pleas are a nullity.

It is also clear that the only authority by which Mr. Daniels is being held in federal custody at this moment is this indictment, and the Government is unable to [9] demonstrate to you affirmatively that they can prove to you and carry their burden of saying that there is a valid indictment pending before you, returned by a validly constituted and extended grand jury.

In the absence of that, your Honor, with all due respect, I believe that there is an invalid proceeding, and that there is no lawful authority to hold the defendants in custody. The superseding indictment which is before you is a nullity.

THE COURT: All right, anything else?

MR. KING: No, sir.

THE COURT: All right, the emergency motion for writ of habeas corpus is denied.

MR. PEARL: Thank you, your Honor.

MR. KING: Thank you, your Honor.

MR. ROLLER: Thank you.

[Certificate of the Official Court Reporter omitted in printing]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 5, 1987.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

ROOSEVELT DANIELS and SANDRA CAMPBELL, Petitioners	)	Petition For Writ of Mandamus
No. 87-1322 vs.	)	
HONORABLE JAMES F. HOLDERMAN, U.S. District Court Judge for the Northern District of Illinois, Eastern Division, Respondent	)	

This matter comes before the court for its consideration of the following documents:

1. "PETITION FOR WRIT OF MANDAMUS" filed herein on March 4 [sic], 1987, by counsel for the petitioners.
2. "GOVERNMENT'S RESPONSE TO PETITIONERS' PETITION FOR WRIT OF MANDAMUS" filed herein on March 4, 1987, by counsel for the respondent.

The district court has not yet had an opportunity to evaluate all of the evidence with regard to petitioners' claim. Judge Holderman will be hearing evidence within

the week that will allow him to do so. Further, because the indictment in question was preceded by two valid indictments, the district court's determination of this issue will not affect the petitioners' custody.

Accordingly, the petition for writ of mandamus is DENIED as premature.

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	85 CR 232
v.	)	
	)	Chicago, Illinois
ROOSEVELT DANIELS, et al.,	)	March 12, 1987
	)	1:34 p.m.
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE JAMES F. HOLDERMAN

APPEARANCES:

For the Government:	HOWARD M. PEARL and MARK D. POLLACK, Assistant U.S. Attorneys
For defendant Roosevelt Daniels:	MICHAEL H. KING and JON K. STROMSTA
For defendant Edward Fitzgerald:	THOMAS ANTHONY DURKIN and JANIS D. ROBERTS
For defendant Sandra Campbell:	DOUGLAS P. ROLLER
For defendant Kenneth Johnson:	JAMES A. GRAHAM
For defendant Troy Campbell:	MARIANNE JACKSON
For defendant Lawrence Lee:	MICHAEL B. COHEN

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

[4] * * * * *

MR. PEARL: We are ready to proceed.

MR. GRAHAM: Judge, I think that we are going to have to have Mr. Johnson in and apprise him of the circumstances and talk to him exactly as to what he is going to want to do at this point.

THE COURT: What circumstances are you referring to?

MR. GRAHAM: Well, it was—is there something resolved as to the grand jury aspects, Judge?

THE COURT: Well, let's move to the grand jury aspects.

I have received the Government's position with regard to the grand jury. I did not get a chance to review anything from the defense. Was there anything filed?

MR. KING: No, Judge. I indicated to you last week that we would try—if we got the Government papers on Monday, we would try to file a written response for today. I got the Government papers—

THE COURT: You told me you would file it [5] yesterday.

MR. KING: Well, in any event, I got the Government—

THE COURT: Right, but let's keep it straight.

MR. KING: I—

THE COURT: Have you filed anything?

MR. KING: I have not filed anything.

THE COURT: All right. I have reviewed the Government's materials. The defense has not filed anything in connection with this matter.

When, Mr. King, if you haven't filed anything, when do you think you are going to put something on file?

MR. KING: Judge, the thing that the Government filed creates several issues that require a substantial amount of research. What I would like to do—

THE COURT: The "thing"?

MR. KING: Marianne Jackson is here now.

THE COURT: The "thing" that the Government filed?

MR. KING: The Government response—

THE COURT: The "thing" that the Government filed was an order by the former Chief Judge of this District.

MR. KING: Yes, sir. That's the document to which I make reference.

THE COURT: Yes, Chief Judge McGarr, former Chief Judge McGarr.

[6] MR. KING: Former Chief Judge McGarr, now Senior Judge McGarr.

THE COURT: Right.

MR. KING: We would like 10 days to file motions before you that are responsive to the issues that we think are now framed.

THE COURT: That request will be denied. You told me you would get a response in by yesterday. Now you want 10 additional days from today?

MR. KING: Judge, I think that a fair statement is that we have an issue of substantial importance and complexity, both as to the procedural matters before you, how best to frame the issues, and how to let them be resolved in an expeditious way.

THE COURT: Mr. King, wait a second. I read that material from the former Chief Judge, and, as far as I could tell from that material, the grand jury had—and I don't have it here in front of me, it's back in the file—the grand jury had made its determination to extend, and he, in fact, had ordered an extension, and there was, as had been indicated to me before, no minute order or no order in the court's file.

Now, having been on the District Court bench for a while, I have learned that on occasion orders do get misplaced, and my understanding of the statement that was [7] made by Judge McGarr, it was either the order, the written order, was misplaced, which had previously been

entered, or that no written order had been entered, but he entered one nunc pro tunc.

Isn't that what was said?

MR. KING: I think that Judge—

THE COURT: —by the former Chief Judge?

MR. KING: Senior Judge McGarr's order speaks for itself. I believe that, as a matter of law—

THE COURT: Well, do you dispute my interpretation of it? The order speaks for itself.

MR. KING: Judge, I think Judge McGarr's order is improper on several grounds. I believe that it is not a matter that can be cured by a nunc pro tunc order. I believe that there are cases that stand for that proposition. I believe a fair reading of Judge McGarr's—

THE COURT: Well, then, why didn't you present something to me yesterday, like you said you would?

MR. KING: Judge, what I anticipated the Government filing was a factual statement. I did not believe—I didn't understand that the Government would file what is apparently a combination affidavit/order from Judge McGarr in which Judge McGarr makes statements about his own recollection, then passes on those statements, and then enters an order based on his reading of his own [8] recollection, combining a function that I believe to be improper. I think that the issues raised by Judge McGarr's order are of very serious concern and need substantial research.

I think for several reasons Judge McGarr's order is a nullity and is not binding on this Court. I believe it's—

THE COURT: Wait. You thought Judge Shadur's order on another grand jury was not only not a nullity, but in fact was binding on this Court—

MR. KING: Judge, I don't believe—

THE COURT: —and now we have got Judge McGarr's order, which sets forth the circumstances of what occurred, and now you are saying that's a nullity?

MR. KING: Judge, I believe that what is clear from Judge McGarr's order is that there is very great probability that no order was entered at the time it was required to be entered.

THE COURT: That's not what it says here, though. That's not what Judge McGarr's order says.

MR. KING: Judge, I'd like to file a written response that makes our point—

THE COURT: Well, were you there?

MR. KING: Pardon?

THE COURT: Were you there?

[9] MR. KING: I absolutely was not there. I had no notice of it.

THE COURT: Judge McGarr was.

MR. KING: Where?

THE COURT: In his courtroom at the time that the events of which he speaks took place

MR. KING: Judge, I would like to address that and the matters raised by Judge McGarr's order. I would like to do it in written form. I will do it as quickly as I can. Hopefully, it will be done in a way that you won't have multiple filings. But I would like to do it in written form. I think that—

THE COURT: Why couldn't you have done it by yesterday, like you said you would?

MR. KING: I did not anticipate what we would get was a nunc pro tunc order from a judge which combined capacities and purported to rule on the motions before you. I think that those raise substantial questions. I assure you I am not doing it for purposes of delay. I think that the matters raised by Judge McGarr's order are of very great significance.

THE COURT: Well, I had intended to rule on this matter today, and when I had not seen anything from the defense filed as the defense had said—the reason we set

up this status report for today was so that you could [10] file yesterday.

MR. KING: Yes, sir. I told you I was unavailable yesterday.

THE COURT: Well, that was the other reason, too, why we set it up. I could have set it up tomorrow.

MR. KING: No, you set it up for my convenience today, and I appreciate that, Judge.

THE COURT: But I guess the reason that I said that you would file—or you said you would file something yesterday was so we could have this status report today, because you were available today.

MR. KING: Yes, sir.

THE COURT: Now, I was going to rule on this matter. When I did not see in my files in my chambers that the defense had responded, I wanted to make sure that the defense had in fact not responded, just to make sure that if the defense had responded, it wasn't somehow misplaced in my chambers.

MR. KING: No, I understand, Judge.

THE COURT: Things happen like that, just like perhaps the minute order with regard to extending the grand jury.

Well, file something tomorrow. I'll set the matter over for status on Monday.

MR. KING: Judge, I will not be prepared to file [11] the kind of document that is appropriate.

THE COURT: What are you going to file?

MR. KING: I'm going to file a motion to dismiss, I'm going to file a legal memorandum in support of it—

THE COURT: Are you going to file anything to rebut the factual statements of Judge McGarr?

MR. KING: Judge, I am unable to rebut the factual statements of Judge McGarr without having appropriate discovery.

THE COURT: You mean you now want to take Judge McGarr's deposition?

MR. KING: Judge, there are a lot of questions that are raised by Judge McGarr's order that I would like to address in writing to you.

THE COURT: You mean you don't think that Judge McGarr is telling the truth?

MR. KING: I would like to respond to the matters raised by Judge McGarr's order in an appropriate way.

THE COURT: I'd like you to answer that question.

MR. KING: Do I think Judge McGarr is lying? No. How can I say that?

THE COURT: All right, then he's not.

MR. KING: I have no basis to say that.

THE COURT: Then he's telling the truth. You have no basis to dispute the factual statements that are made in [12] here.

MR. KING: Judge McGarr has filed an order that deals with his recollection, apparently, with other factual matters that are not a product of his own recollection.

THE COURT: Every time—

MR. KING: He then purports to evaluate those and rule on them as a matter of law. He issued a nunc pro tunc order. What is completely clear from Judge McGarr's order is that there was no order entered at the time that anybody can produce to you that extended the grand jury.

THE COURT: Well, there was no written order.

MR. KING: What Judge McGarr says in his order is, "I either intended to or I may have." He doesn't give you a date, he doesn't provide you with a transcript of the proceedings, he provides you with nothing but his conclusion. He provides you then with a ruling on his conclusion.

THE COURT: What he states in paragraph 10—

MR. KING: He has combined capacities.

THE COURT: What he states in paragraph 10—as you stated earlier, the order speaks for itself—paragraph 10 says:

> "It now appears that through inadvertence or mistake a written extension order was not presented to or executed by the Court or that such an order was executed and has since been lost."

[13] MR. KING: Right.

THE COURT: That's what he says.

MR. KING: And on two of those three possibilities, the indictments are invalid on their face, because I don't believe that if either one or two occurred and not three that that can be cured by a nunc pro tunc order.

THE COURT: Well, you know, the statute doesn't say anything about written order.

MR. KING: Judge, I would like to address these questions in writing to you in an appropriate form.

THE COURT: Well, I wanted you to—

MR. KING: I will do that as quickly as I can. I am unable to stand here today and give you the legal authority for the propositions that I think are reasonably straight forward as a matter of law that will prove to you, I believe, that this indictment is invalid, that the return by the grand jury was improper, and that this Court is without jurisdiction with respect to Roosevelt Daniels on the indictment pending before you.

MR. DURKIN: Judge—

THE COURT: Well, the Government filed—let me just—the Government filed on Monday. Can you get something in by Monday, the 16th? Then you would have had a week. You have actually been aware of this issue for some time, since you filed that motion for release of your client back [14] in February.

MR. KING: Judge McGarr's nunc pro tunc order—

THE COURT: Yes?

MR. KING: —is a significant event in terms of the motion. Judge McGarr's order needs to be addressed, it needs to be addressed in an appropriate—

THE COURT: Well, Mr. King, I just asked you can you do it by Monday?

MR. KING: I don't believe I can, Judge.

THE COURT: Can you do it by Tuesday?

MR. KING: Judge, I'm going to be out of town Friday, I'm going to be out of town—

THE COURT: What are you going to be doing out of town?

MR. KING: I have previous commitments.

THE COURT: You know, Mr. Daniels has another lawyer standing here, he has other lawyers back in other law firms. It is crucial that, since you have other commitments on other cases for other clients out of town, that some other lawyer for Mr. Daniels, since he has a number of lawyers in this matter, can't prepare something and get it filed on Monday?

MR. KING: Judge, I assure you, things are being worked on as we stand here.

THE COURT: Fine. Can you get them on file by [15] Monday?

MR. KING: I can only give you my best effort. I can't commit to something that I don't know I can deliver on.

THE COURT: Well, you actually had committed to yesterday, but—

MR. DURKIN: Judge, could I—

THE COURT: Sure.

MR. DURKIN: —add this for whatever it's worth—

THE COURT: —since we are not making any headway here.

MR. DURKIN: —on scheduling?

Since I didn't join in Mr. King's motion—or the writ of—the petition—

THE COURT: Well, your guy already was out.

MR. KING: He had won that one.

MR. DURKIN: He had his own—

THE COURT: You were in a different posture than he was.

MR. DURKIN: But seeing as though I didn't need a writ at the time, I had intended to file a motion to dismiss that would substantially cover the same issue. I believe, and I don't want to belabor it now, but I think there is some case law to the proposition that Judge McGarr's order cannot nunc pro tunc the extension of the grand jury, [16] and that there is a jurisdictional question of whether or not an order was entered. I don't want to argue it now or belabor it, but I did intend to file a motion in the nature of a motion to dismiss and to withdraw the guilty plea based on the Macklin case that I believe is referred to in Mr. King's petition. I think there is—

THE COURT: Wait. Mr. King's petition? You mean the one that went to the Seventh Circuit and came back?

MR. DURKIN: I thought it was filed before you, but maybe it's the one up in the Seventh Circuit. There is a case called United States v. Macklin—it's a Second Circuit case—that I think speaks of the jurisdictional issue.

The case the Government cites in their response to Mr. King's petition is McKay—or Wax v. Motley, and I—

THE COURT: Well, let me just say that on that petition, I interpreted the Seventh Circuit's order to basically moot that petition. The Seventh Circuit in its opinion stated that the defendants would not be released since the two other indictments still remain—

MR. DURKIN: I think that's right.

THE COURT: —even if this indictment that's pending is invalid.

MR. DURKIN: No, I think that's right.

[17] THE COURT: So that really moots that petition.

MR. DURKIN: No, I know—

THE COURT: That's not viable anymore. That's been ruled on by the Seventh Circuit.

MR. DURKIN: I'm only suggesting that on Fitzgerald's behalf, I do intend to file as quickly as I can a pleading based upon Macklin in the nature of a motion to dismiss and to withdraw the plea.

THE COURT: Well, can you get it on file by Monday?

MR. DURKIN: I will do whatever the Court sees fit. I think it's a significant enough issue that I would like to have more time, but I can get it done by Monday if the Court—I don't want—all I'm saying, Judge, is I don't want to duplicate the effort, and I believe I can convince you that we are entitled to some type of evidentiary hearing, and that Judge McGarr's order can't nunc pro tunc the jurisdiction of the grand jury.

THE COURT: Yes, but if Judge McGarr—judges sign orders every day. If it was up to the Judge's recollection as to whether an order was signed and thereafter lost or whether no order was presented and therefore not executed, when, in fact, the grand jury had requested an extension, and the Judge granted the extension, we would be in a difficult posture.

The way I see Judge McGarr's order is that [18] he recalls exactly what he said, which is that, through inadvertence or mistake, a written extension order was not presented to or executed by the Court, or that such an order was executed and has since been lost.

Now, it seems to me that if an order was, in fact, executed, and has since been lost, that, under that circumstance, the grand jury is not invalid, and, in fact, even

if no written extension order was presented, I would have to review the case law to see what judicial gloss the judges have put on the extension statute, but, from my reading of the extension statute, there really is no requirement that a written order be entered, and, in fact—

MR. DURKIN: That may be the case.

THE COURT: —if the judge of the district court fails to extend the grand jury when the grand jury wants to extend, the grand jury can petition the chief judge of the circuit, and there's no indication that the chief judge of the circuit has to enter a written order.

MR. DURKIN: Maybe it's because I haven't been in this, but is there any reason why there just isn't a—why we have to—is there a transcript? Don't these things occur in open court?

THE COURT: I only can deal with what's in front of me. You are asking me if there's a transcript. I wasn't there.

[19] MR. ROLLER: That's the reason, I think, Judge—

MR. DURKIN: No, I wasn't, either, but I mean the only thing—I mean I don't want to belabor it now. I think you may be correct, I may be correct. I don't know. I simply wanted to apprise you that that's what I would be doing.

If it will make your work easier, instead of having to rule twice, I can have something on file by Monday or Tuesday, if that's fitting.

THE COURT: All right. Well, let's go back to Mr. King, then.

Mr. King, with all your obligations out of town, when do you think you can get something on file?

MR. KING: Judge, I asked for 10 days from today. I—

THE COURT: Why do you need that much time? I mean that really is a long time.

MR. KING: How about—

THE COURT: This case has been pending a long time.

MR. KING: Judge, it has.

THE COURT: I want to get it to a resolution one way or the other, and I expect the lawyers to help me out in that. I, frankly—the fact that you said—you stood right here and said you would file something by yesterday, I can't understand why you just let it go by, didn't come [20] in on a motion to apprise me and ask for an extension of time if that's in fact, what you wanted. You know, I hear criminal motions every day at 1:30.

MR. COHEN: Judge, can I be heard for a second?

THE COURT: Certainly.

MR. COHEN: I think this case is obviously going to a higher court either way.

THE COURT: It is.

MR. COHEN: Right, and I think that it ought to be put in the proper posture to arrive there.

I have discussed this briefly with Mr. King. If the Seventh Circuit doesn't have the full total picture, then it's going to bounce up and back and up and back. I think they ought to get it—we ought to be given 10 days to present our joint position to you. I see a lot of problems with Judge McGarr's order.

THE COURT: But the full total picture, what do you envision that to be?

MR. COHEN: I think there's a lot lacking now. We are dealing with Judge McGarr's recollection. That might not be the best evidence of what happened, and we would like to ascertain if such evidence exists. I'm not talking about cross-examining Judge McGarr. There are other avenues that are open to various defendants which we have sat down and discussed for two hours already today. We are not laying [21] down doing nothing on this.

I think it's a very, very—a substantial issue that has been raised by Judge McGarr's order and the grand jury proceedings.

MR. KING: Judge, if I could have until the close of business Thursday, we'll get the papers on file to you. Frankly, I want these papers to be the best papers we can file, and I want to take a close look at them, and I want not to have to replow ground already plowed. I'd like to have whatever motions—

THE COURT: What ground has been plowed on this issue?

MR. KING: Pardon?

THE COURT: What ground has been plowed on this issue?

MR. KING: Well, I think the question of custody has been dealt with by the Court of Appeals—

THE COURT: Right.

MR. KING: —and so the procedural question of habeas corpus has now got to be examined as to whether that's the proper motion that ought to be before you, whether there ought—the Government has taken the position that guilty pleas waive jurisdictional defects, and we don't agree with that as a matter of law, but that needs to be addressed—

THE COURT: Wait, has the Government—the Government hasn't said that here, have they?

[22] MR. KING: They said that in the Court of Appeals, Judge.

THE COURT: Yes, but, you see, that was on a—

MR. KING: As a matter of fact, they said it before you.

THE COURT: —that was on a writ of habeas corpus which the Court of Appeals—you took on a mandamus to the Seventh Circuit, and the Court of Appeals denied the mandamus, and—

MR. KING: —as being premature, yes, sir.

THE COURT: —on grounds of being premature, but also added in the order—

MR. KING: Yes, sir.

THE COURT: —something which I consider to be dispositive of the issue.

MR. KING: Judge, I am absolutely as sensitive as you are to the language in the Court of Appeals' order—

THE COURT: Right.

MR. KING: —and that's why I want the proper motions before you, so that you can rule, and the record will be clear.

THE COURT: Well, do you agree that that was dispositive of the issue? I mean, the Court of Appeals didn't say—

MR. KING: It's a matter of great substance to [23] me, I'll say that.

THE COURT: Pardon me?

MR. KING: It's a matter of great substance to me that they said that.

THE COURT: The Court of Appeals didn't say because these defendants have pleaded guilty, they waive the jurisdictional—

MR. KING: No, they did not.

THE COURT: The Court of Appeals didn't say that.

MR. KING: No, they did not.

THE COURT: So whatever the Court of Appeals said in response to your petition for mandamus, that has no bearing on anything that's pending before me.

MR. KING: Well, as a matter of fact, my recollection is—I may be wrong—my recollection is Mr. Pearl said that to you also when we were before you on that Friday.

THE COURT: But that has no bearing on me on this point now. That was on something that has already been decided—

MR. KING: Judge, the issue is—

THE COURT: —by the Court of Appeals.

MR. KING: The issue, the broad issue, is, is there a valid indictment before you. We want that issue formed and shaped in a way that's appropriate, clean, and you can rule on it, the Government can respond, and whatever will [24] happen will happen with respect to that.

I don't want part of a habeas corpus that may be without foundation because of the custody indication by the Appellate Court.

Frankly, I think this is a time when—

THE COURT: It was more than an indication. It was a ruling.

MR. KING: Well, no, what the ruling was is that it was denied as premature. The ruling wasn't that it's denied as being—

THE COURT: Well, okay, it was instructive.

MR. KING: I accept that.

THE COURT: And I must follow the instructions of the Seventh Circuit. That's my job.

MR. KING: I accept that, Judge. I think it's appropriate that the issues be framed properly before you, and this is a time—you are absolutely correct, this case has gone on a very long time—this is a time, I believe, a point where an extra day or two will save a lot of time and a lot of confusion and will save a lot of unnecessary time later on if clean narrow issues are presented to you and you can rule on them in whatever way the Court deems appropriate.

THE COURT: If I firmly believed that giving you more time would make the issues narrower or cleaner, I would [25] do it.

MS. ROBERTS: Judge, on behalf of Mr. Fitzgerald—on behalf of Mr. Fitzgerald, I believe that giving us until

some time next week, all defendants, at least Mr. Fitzgerald, time to properly put this issue before the Court, will make it cleaner, and therefore make the record clearer for the Seventh Circuit, which is obviously going to have to decide this question.

My reading, and I—

THE COURT: All right, I'm going to give the defendants all the time they want. You want 10 days. Ten days runs off on Sunday, March 22nd. You have until March 23rd to file any motions, any memoranda in support thereof, in connection with what we will broadly call—or what you have broadly called the validity of the indictment.

MR. KING: Thanks, Judge.

THE COURT: You are welcome.

* * * * *

[Certificate of the Official Court Reporter omitted in printing]

[1]*

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	85 CR 232
v.	)	
	)	Chicago, Illinois
ROOSEVELT DANIELS, et al.,	)	April 8, 1988
	)	1:30 p.m.
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE JAMES F. HOLDERMAN

APPEARANCES:

For the Government:	HOWARD M. PEARL and VICTORIA J. PETERS Assistant U.S. Attorneys
For defendant Roosevelt Daniels:	MICHAEL H. KING and ALLAN A. ACKERMAN
For defendant Edward Fitzgerald	JOHN ESPAR
For defendant Kenneth Johnson:	GLENN SEIDEN

* * * * *

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

[6] MR. ACKERMAN: There has been a unanimity of acknowledgment on that score, your Honor.

THE COURT: All right.

All right, with regard to the defendants' motion to dismiss the second superseding indictment and request for an evidentiary hearing, I believe that all the pertinent issues that need to be dealt with in connection with that motion have been dealt with by the Seventh Circuit in United States v. Taylor. That case dealt with a codefendant in this case.

The statements made by the Seventh Circuit with regard to the facts that were before it in connection with Mr. Taylor's case are precisely the facts that would be before me in connection with the determination as to the codefendants. I believe the grand jury was validly extended, and the indictment need not be dismissed on that basis. Consequently, that motion will be denied, and there's no need for an evidentiary hearing, since all the pertinent facts really are clear in the record.

All right, with regard to the defendants' motion to recuse me from dealing with the motions to withdraw the guilty pleas, it seems to me that that motion is, in fact, premature, because at this point I am certainly capable of dealing with the motion to withdraw the guilty pleas.

[10] * * * * *

MR. KING: Your Honor, on the—have you finished that matter, Judge?

THE COURT: Yes. Is there anything else we need to discuss today?

MR. KING: On the motion to dismiss the indictment, you talked about—in your ruling you mentioned the impact of the Taylor opinion on the factual determinations. There were some grounds that were asserted in that motion that really did not deal with Taylor that dealt with

effective assistance of counsel and the proceedings that had occurred with respect to the pending motions.

I just wanted to be clear that you were addressing those also in your ruling, so the record would be clear.

THE COURT: The entire motion to dismiss is denied.

MR. KING: Thank you.

MR. SEIDEN: Does that conclude the matter, Judge?

THE COURT: Call the next case.

* * * * *

[Certificate of the Official Court Reporter omitted in printing]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 25, 1988.

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

No. 88-1750	)	
	)	
IN THE MATTER OF:	)	Petition for
	)	Writ of Mandamus.
ROOSEVELT DANIELS,	)	No. 85 CR 232
SANDRA CAMPBELL,	)	Judge
LAWRENCE LEE, EDWARD	)	James F. Holderman
FITZGERALD, and	)	
KENNETH JOHNSON,	)	
Petitioners.		

This matter comes before the court for its consideration of the "PETITION FOR WRIT OF MANDAMUS" filed herein on April 19, 1988, by counsel for the petitioners.

In *U.S. v. Taylor*, No. 87-1378, slip op. (7th Cir. February 17, 1988), this court made the legal determination that the special October 1984, grand jury was properly constituted when it turned in indictments beyond its initial 18 month term. That decision controls this case. Accordingly,

IT IS ORDERED that said motion is DENIED.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Roosevelt DANIELS, et al.,
Defendants-Appellants.

No. 88-1767.

United States Court of Appeals,
Seventh Circuit.

Submitted May 16, 1988.

Decided May 31, 1988.

* * * * *

Before COFFEY, FLAUM and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

The five defendants in this case pleaded guilty to criminal charges filed against them but have not been sentenced. They have moved to withdraw their pleas on the ground that the grand jury that indicted them was serving beyond its term. After this court rejected a challenge to the tenure of the same grand jury, *United States v. Taylor*, 841 F.2d 1300 (7th Cir.1988), the district court declined to set aside the pleas. Contending that they want to make arguments not considered in *Taylor*, the defendants filed an interlocutory appeal.

The defendants have not been sentenced, so the appeal is premature. See *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982) (claim that the indictment is based on prosecutorial vindictiveness may not be appealed before judgment); *United States v. MacDonald*, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978) (claim that the prosecution violates the

Speedy Trial Clause may not be appealed before judgment). The defendants assert that because of *United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed. 2d 50 (1986), they will be unable to present any objection to the term of the grand jury on appeal from a final judgment, so they must be able to raise it now. There are three flaws in that position.

First, *Mechanik* holds only that once a defendant's guilt has been established beyond a reasonable doubt, he may not raise objections to those portions of the grand jury's procedure that are designed to prevent the accusation of innocent persons. See *United States v. Fountain*, 840 F.2d 509, 514-15 (7th Cir.1988). The authoritative determination of guilt establishes that any defects in the procedure did not lead to the accusation of an innocent person and shows that obtaining a new indictment would be a charade. Some rules, such as the ban on racial discrimination in the selection of grand jurors, serve other or additional ends and may be invoked to contest an indictment even after conviction. *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986); *Mechanik*, 475 U.S. at 70 n. 1, 106 S.Ct. at 941-42 n. 1. Whether the grand jury was serving beyond its time is unrelated to the guilt or innocence of the defendants, so the authoritative resolution of their guilt at trial probably would not preclude making such a claim, if it is otherwise a ground for reversal. (Given the considerations discussed below, we need not decide whether "probably" is a necessary qualifier.)

Second, to the extent a resolution of factual guilt or innocence blots out a challenge to the procedures used before a grand jury, the defendants have lost their ability to pursue these claims already. They pleaded guilty, and a plea is as effective as a jury verdict in establishing factual guilt. *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); *Brady v. United States*, 397

U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). The imposition of sentence on the pleas will not eliminate any claim defendants now possess. Of course they may possess none, for the plea of guilty surrenders any objections to defects in the institution of the proceedings that could have been raised as defenses. See *Tollett*, *Brady*, and, e.g., *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Perhaps defendants wish to present arguments along the line of *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975), and *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); as the issue has not been briefed we do not say that the attack on the grand jury is forfeit. It is enough to say that imposition of sentence will not cause the defendants' position to deteriorate further.

Third, to the extent *Mechanik* bars review of grand jury questions on appeal from the final judgment, it does so because any errors are too insignificant to call for correction. If the errors are too insignificant after conviction, they are too insignificant before conviction. The Supreme Court has emphasized many times that criminal cases should not be interrupted by interlocutory appeals except in the most compelling circumstances. Multiple appeals produce leaden-footed justice and divert the time of courts from more pressing questions raised by other parties. See *Cobbledick v. United States*, 309 U.S. 323, 324-26, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1940). Interlocutory appeals on the approach of *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), depend on the existence of a "right not to be tried"—in *Abney*, a right under the Double Jeopardy Clause. A "right not to be tried" is lost if not vindicated before trial. Defects in the initiation of the proceedings do not create "rights not to be tried". *Hollywood Motor Car* holds that objections to the procuring of an indictment may not be

raised by interlocutory appeal. Grand jury claims therefore may not be raised by interlocutory appeal. *United States v. LaRouche Campaign*, 829 F.2d 250 (1st Cir.1987); contra, *United States v. Dederich*, 825 F.2d 1317 (9th Cir. 1987). It may be that under *Mechanik* some claims are "lost" as a result of the trial. But this occurs, the Court emphasized, only when the results of the trial show that the claim was not serious to begin with. The possibility that a claim might be lost *because any error was harmless* is hardly a reason why the court should entertain an interlocutory appeal on the same subject. If that were enough to justify an appeal, every objection to a grant or denial of civil discovery would be appealable.

Many issues concerning discovery, class certification, the grant or denial of stays, and the disqualification of counsel are neither appealable before trial nor grounds for reversal after trial. E.g., *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, ___ U.S. ___, 108 S.Ct. 1133, 99 L. Ed.2d 296 (1988) (stays); *Flanagan v. United States*, 465 U.S. 259, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984) (disqualification of counsel in criminal case); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981) (disqualification of counsel in civil case); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (class certification); *In re Schmidt*, 775 F.2d 822 (7th Cir.1985) (disqualification of counsel before grand jury). To say that a question may evade appellate review is not to say that it will evade *judicial* review; the district court has considered (and rejected) the defendants' contentions. If any error is sufficiently important to call for reversal on appeal from the final judgment, the defendants will have relief then; if it is not sufficiently material to call for reversal, there is no reason for appellate review at any time.

The appeal is dismissed for want of jurisdiction.

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	85 CR 232
v.	)	
	)	Chicago, Illinois
ROOSEVELT DANIELS, et al.,	)	February 26, 1987
	)	Afternoon session
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE JAMES F. HOLDERMAN

APPEARANCES:

For the Government: HOWARD M. PEARL, VICTORIA J. PETERS and MARK D. POLLACK, Assistant U.S. Attorneys

For defendant Kenneth Johnson: GLENN SEIDEN

* * * * *

[9] MS. PETERS: I'll call the two attorneys that are involved and report back to Ms. Branch.

THE COURT: All right.

Let me just ask the Government, before you leave—

MS. PETERS: Oh, I wasn't leaving. We have got the Rone hearing for Troy Campbell that—

---

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

THE COURT: Okay. I guess before we leave the case of Kenneth Johnson, what is the Government's position with regard to this issue which you mentioned in your motion?

MR. PEARL: Judge, it's our position that in this case there's no question that the Court had jurisdiction irrespective of what might turn out to be the case with respect to the extension of the Grand Jury for the third indictment.

The first two indictments are unquestionably valid, which would grant this Court jurisdiction. The only possible issue would involve the additional counts added in the third indictment which applies only to Mr. Daniels, some telephone counts. I think they are valid, anyway.

I don't think it's a problem, but before we addressed all those issues, we thought we should apprise the Court first of the problem and, second, find out what the facts are.

MS. PETERS: This is something that we have only [10] recently learned about, and until we learn all the facts, it's hard for us to really articulate what our legal position is, because they are all fact-dependent.

THE COURT: All right. Well, let me know the next time we see one another.

MS. PETERS: Believe me, there are a lot of people in our office working on it.

THE COURT: All right.

[Certificate of the Official Court Reporter omitted in printing]

RECEIVED
MAR 3, 1987
FRANK J. McGARR
U.S. DISTRICT COURT
SENIOR JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF THE	)	
	)	Judge
SPECIAL OCTOBER 1984	)	Frank J. McGarr
	)	
GRAND JURY	)	

ORDER

On motion of the UNITED STATES OF AMERICA, by ANTON R. VALUKAS, United States Attorney for the Northern District of Illinois, the Court finds as follows:

1. On September 10, 1984, Acting Chief Judge Prentice Marshall entered an order calling for a special grand jury to be convened under 18 U.S.C. §§ 3331(a) and 3332(b). Pursuant to that order, the Special October 1984 Grand Jury was convened in October 1984.

2. In March 1986, the Special October 1984 Grand Jury voted unanimously to extend its term of service for an additional period of six months. The grand jury informed the deputy clerk of its decision, and instructed the deputy clerk to present a motion for a judicial order of extension. A motion to extend the grand jury was prepared by the United States Attorney's Office.

3. The foreman and other members of the Special October 1984 Grand Jury recall that they appeared before

this Court in March 1986, and that at that time this Court extended the grand jury's term of service.

4. The Court recalls that in March 1986 the Special October 1984 Grand Jury appeared before the Court, and the Court extended the grand jury's term of service.

5. As Chief Judge for the District Court of the Northern District of Illinois, I was familiar in March 1986 with the volume of business being conducted before the Special October 1984 Grand Jury.

6. In the six months following the Court's March 1986 extension of the grand jury's term of service, the Special October 1984 Grand Jury appeared on numerous occasions before this Court to return indictments and to conduct other business. This Court also entered orders substituting grand jurors to allow the grand jury to continue operations. On all of these occasions, the Court considered the grand jury to be a properly extended special grand jury, and the Court treated it as such.

7. The Court determined in March 1986, that the grand jury had additional matters to transact, had not yet completed its business, and should therefore be extended another six months.

8. Based on the Court's dealings with the Special October 1984 Grand Jury, and the Court's own recollections, the Court finds that it intended to, and did in fact order in March 1986 that the Special October 1984 Grand Jury continue to serve for an additional six months. This conclusion is supported by the fact that between March and September 1986 the Court considered the grand jury to be a properly extended grand jury, and it treated the grand jury as such.

9. The Clerk of the District Court for the Northern District of Illinois has been unable to locate a March 1986

judicial order extending the term of service of the Special October 1984 Grand Jury.

10. It now appears that, through inadvertence or mistake, a written extension order was not presented to, or executed by the Court, or that such an order was executed and has since been lost.

11. In view of the Court's contemporaneous determination that the grand jury had not completed its business, and in view of the Court's recollection that it extended the grand jury's term of service, the Court finds that any failure to enter a written extension order was non-substantive and ministerial.

12. In order that the record may "speak the truth" and reflect accurately the Court's original intentions and orders, it is necessary that the Court enter an order *nunc pro tunc* extending the term of service of the Special October 1984 Grand Jury.

13. THEREFORE, IT IS HEREBY ORDERED that the Special October 1984 Grand Jury be extended from March 25, 1986 to September 25, 1986.

14. Based on the *nunc pro tunc* order of extension entered herein and based on the other findings the Court has made in this order, the Court further finds and holds that the validity of all the indictments returned by the Special October 1984 Grand Jury during the period March 25, 1986, to September 25, 1986, is not affected by any failure to enter a written extension order in March 1986.

ENTER:

/s/ FRANK J. MCGARR

DATED:_____

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: Date: MAR 3, 1987

Name of Assigned Judge: FRANK J. McGARR

Case Title: IN THE MATTER OF THE SPECIAL OCTOBER 1984 GRAND JURY

MOTION: GOVERNMENT'S MOTION TO COMPLETE DISTRICT COURT CLERK'S FILE.

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

ORDERED that the Special October 1984 Grand Jury be extended from March 25, 1986 to September 25, 1986 etc.

(3) ☒ Filed motion of [use listing in "MOTION" box above].

* * * * *

(12) ☒ [For further detail see ☐ order on reverse of ☒ order attached to the original minute order form.]

☒ No notices required.

* * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 85 CR 232
v.	)	
	)	Honorable
ROOSEVELT DANIELS, et al.	)	James F. Holderman

GOVERNMENT'S REPORT TO THE COURT CONCERNING THE MARCH 1986 EXTENSION OF THE TERM OF SERVICE OF THE SPECIAL OCTOBER 1984 GRAND JURY

Now comes the United States of America, by and through its attorney, ANTON R. VALUKAS, and submits the following report to the Court concerning the March 1986 extension of the term of service of the Special October 1984 Grand Jury.

On March 3, 1987, Judge Frank J. McGarr issued an order detailing the facts surrounding the March 1986 extension of the Special October 1984 Grand Jury. (Exhibit A). In March 1986, the Special October 1984 Grand Jury voted to extend its term of service for an additional six months. (*Id.* at par. 2). Judge McGarr, the foreman and other members of the grand jury recall that in March 1986, the grand jurors appeared before Judge McGarr, and that Judge McGarr extended the grand jury's term of service. (*Id.* at pars. 3-4). Judge McGarr stated in the order that although the Clerk's office has been unable to locate a March 1986 order extending the grand jury's term, "the Court finds that it intended to, and did in fact order in March 1986 that the Special October 1984 Grand Jury continue to serve for an additional six months." (*Id.* at pars.

8-9). Finding that "through inadvertence or mistake, a written extension order was not presented to, or executed by the Court, or that such an order was executed and has since been lost," Judge McGarr entered an order *nunc pro tunc* extending the term of service of the Special October 1984 Grand Jury from March 25, 1986 to September 25, 1986. (*Id.* at pars. 12-13).

Based on that *nunc pro tunc* order of extension and the other findings in that order, Judge McGarr held that "the validity of all indictments returned by the Special October 1984 Grand Jury during the period March 25, 1986, is not affected by any failure to enter a written extension order in March 1986." (*Id.* at par. 14).

Judge McGarr's *nunc pro tunc* order extending the term of service of the Special October 1984 Grand Jury and his finding that the indictments returned by that grand jury during its extended term are valid establish conclusively that the grand jury was properly extended and that the second superceding indictment in the case was validly returned. The validity of Judge McGarr's *nunc pro tunc* extension order is not a proper subject for an adversary proceeding. *Wax v. Motley*, 510 F.2d 318, 321 (2nd Cir. 1975).

For these reasons, the government respectfully requests that this Court deny defendants' petition for a writ of habeas corpus.

Respectfully submitted,

ANTON R. VALUKAS
United States Attorney

By: _____
Howard M. Pearl
Assistant United States Attorney

HMP/dc

EXHIBIT A

RECEIVED
MAR 3, 1987
FRANK J. McGARR
U.S. DISTRICT COURT
SENIOR JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF THE	)	
	)	Judge
SPECIAL OCTOBER 1984	)	Frank J. McGarr
	)	
GRAND JURY	)	

ORDER

On motion of the UNITED STATES OF AMERICA, by ANTON R. VALUKAS, United States Attorney for the Northern District of Illinois, the Court finds as follows:

1. On September 10, 1984, Acting Chief Judge Prentice Marshall entered an order calling for a special grand jury to be convened under 18 U.S.C. §§ 3331(a) and 3332(b). Pursuant to that order, the Special October 1984 Grand Jury was convened in October 1984.

2. In March 1986, the Special October 1984 Grand Jury voted unanimously to extend its term of service for an additional period of six months. The grand jury informed the deputy clerk of its decision, and instructed the deputy clerk to present a motion for a judicial order of extension. A motion to extend the grand jury was prepared by the United States Attorney's Office.

3. The foreman and other members of the Special October 1984 Grand Jury recall that they appeared before this Court in March 1986, and that at that time this Court extended the grand jury's term of service.

4. The Court recalls that in March 1986 the Special October 1984 Grand Jury appeared before the Court, and the Court extended the grand jury's term of service.

5. As Chief Judge for the District Court of the Northern District of Illinois, I was familiar in March 1986 with the volume of business being conducted before the Special October 1984 Grand Jury.

6. In the six months following the Court's March 1986 extension of the grand jury's term of service, the Special October 1984 Grand Jury appeared on numerous occasions before this Court to return indictments and to conduct other business. This Court also entered orders substituting grand jurors to allow the grand jury to continue operations. On all of these occasions, the Court considered the grand jury to be a properly extended special grand jury, and the Court treated it as such.

7. The Court determined in March 1986, that the grand jury had additional matters to transact, had not yet completed its business, and should therefore be extended another six months.

8. Based on the Court's dealings with the Special October 1984 Grand Jury, and the Court's own recollections, the Court finds that it intended to, and did in fact order in March 1986 that the Special October 1984 Grand Jury continue to serve for an additional six months. This conclusion is supported by the fact that between March and September 1986 the Court considered the grand jury to be a properly extended grand jury, and it treated the grand jury as such.

9. The Clerk of the District Court for the Northern District of Illinois has been unable to locate a March 1986 judicial order extending the term of service of the Special October 1984 Grand Jury.

10. It now appears that, through inadvertence or mistake, a written extension order was not presented to, or executed by the Court, or that such an order was executed and has since been lost.

11. In view of the Court's contemporaneous determination that the grand jury had not completed its business, and in view of the Court's recollection that it extended the grand jury's term of service, the Court finds that any failure to enter a written extension order was non-substantive and ministerial.

12. In order that the record may "speak the truth" and reflect accurately the Court's original intentions and orders, it is necessary that the Court enter an order *nunc pro tunc* extending the term of service of the Special October 1984 Grand Jury.

13. THEREFORE, IT IS HEREBY ORDERED that the Special October 1984 Grand Jury be extended from March 25, 1986 to September 25, 1986.

14. Based on the *nunc pro tunc* order of extension entered herein and based on the other findings the Court has made in this order, the Court further finds and holds that the validity of all the indictments returned by the Special October 1984 Grand Jury during the period March 25, 1986, to September 25, 1986, is not affected by any failure to enter a written extension order in March 1986.

ENTER:

/s/ FRANK J. MCGARR

DATED:_____

[Affidavit of Mailing and Service
List omitted in printing]

(Letterhead Of)

ROSS & HARDIES

March 9, 1987

By Messenger

Hon. Frank J. McGarr
U. S. District Court
for the Northern District
of Illinois
219 South Dearborn Street
Suite 1846
Chicago, IL 60604

Re: The Special October 1984 Grand Jury

Dear Judge McGarr:

I represent Roosevelt Daniels in Indictment No. 85 CR 232, pending before Judge James F. Holderman of this court, an indictment returned by the Special October 1984 Grand Jury. I have already filed motions before Judge Holderman and in the Seventh Circuit regarding the validity of indictments returned by that Grand Jury and particularly dealing with the questions involved in the alleged failure to properly extend that Grand Jury. Judge Holderman has scheduled a status report on my motion for March 12, 1987.

I am informed that you are in the process of entering some form of order relating to the previous lack of proper extension of that and other grand juries or have already done so. Such an order would significantly affect the constitutional rights of my client Mr. Daniels. I believe it would be improper for you to enter such an order without notice to all parties who might be affected, including,

particularly, my client. I believe you are now without jurisdiction as to that Grand Jury and you are without jurisdiction as to any indictments returned by that Grand Jury which are not pending before you. To the extent that you are attempting to or your orders may have the effect of impacting pending cases before other judges, I believe it would be a violation of the rights of the defendants in those cases for you to enter any order without notice, appropriate discovery and a hearing before a neutral judge. To the extent that you are making legal rulings, I believe it to be an improper exercise of your authority since my client's case is not assigned to you. To the extent that you are making a factual determination, you are in no different posture than any other witness and are not acting in a judicial capacity under those circumstances. I believe I have the right to take your deposition or such other discovery as may be appropriate under the circumstances to develop a complete factual record.

I wish to be heard in open court on this matter prior to your taking any action. If my information is incorrect and you have not been requested to, have not or do not intend to take any action regarding the Special October 1984 Grand Jury and any procedural orders relating thereto, I apologize for taking the court's time. If to your knowledge any other judge of the Northern District is contemplating such action, I request you furnish this letter to him or her and notify me of the identity of such judge and a time when I may be heard. While I do not represent any other defendants who I know at this time will be impacted by any such proposed action by you or any other judge, I reiterate my belief that prior to your taking any action you have an obligation to inform counsel for all defendants who might be impacted by such an order.

Respectfully submitted,

/s/ MICHAEL H. KING, P.C.
Michael H. King, P.C.

/c

cc: Hon. John F. Grady, Chief Judge
Marianne Jackson, Esq.
Douglas P. Roller, Esq.
Allan A. Ackerman, Esq.
Michael B. Cohen, Esq.
Glenn Seiden, Esq.
Thomas A. Durkin, Esq.
Chester Slaughter, Esq.
Douglas Morrison, Esq.
Howard M. Pearl, Assistant U.S. Attorney

(Letterhead Of)

UNITED STATES DISTRICT COURT

March 10, 1987

Mr. Michael H. King
Ross & Hardies
150 North Michigan Avenue
Chicago, Illinois 60601-7567

Dear Mr. King:

I have your letter of March 9 indicating that you represent a defendant in the district court and on his behalf have filed motions attacking the validity of indictments returned by the Special October 1984 Grand Jury.

In your letter, you indicate that you believe I am in the process of entering some form of order with regard to that grand jury situation, and assert your right on behalf of your client to appear and be heard on that subject.

Before receipt of your letter, I did enter an order with regard to that situation, which I regarded as ministerial and intended only to correct the record. I did not believe at the time that it was necessary to give notice or afford an opportunity to be heard.

Upon receipt of your letter, I have reconsidered the matter and it is still my decision that my order was appropriately entered without notice or hearing.

Sincerely,

/s/ FRANK J. MCGARR
Frank J. McGarr

bjb

cc: The Honorable John F. Grady
The Honorable James F. Holderman
Ms. Marianne Jackson
Mr. Douglas P. Roller
Mr. Allan A. Ackerman
Mr. Michael B. Cohen
Mr. Glenn Seiden
Mr. Thomas A. Durkin
Mr. Chester Slaughter
Mr. Douglas Morrison
Mr. Howard M. Pearl
Mr. Anton R. Valukas

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	85 CR 232
v.	)	
	)	Chicago, Illinois
ROOSEVELT DANIELS, et al.,	)	April 22, 1988
	)	10:42 a.m.
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE JAMES F. HOLDERMAN

APPEARANCES:

For the Government:	DAVID J. STETLER HOWARD M. PEARL and VICTORIA J. PETERS Assistant U.S. Attorneys
For defendant Daniels:	JON K. STROMSTA and KURT H. FEUER
For defendant Sandra Campbell:	DOUGLAS P. ROLLER

[3] * * * * *

MR. STROMSTA: We did speak with Mr. Cohen and Mr. Durkin about dates on their calendars, and we have some proposed dates in the month of May.

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

THE COURT: Why so long? Why can't we—you know, I waited so that the Court of Appeals could make a determination. You have now attacked my waiting for the Court of Appeals to make its decision. Since that time you filed what is I consider a frivolous appeal. And in Mr. King's letter to me, he suggested that we change this date today.

Now, I assume that with that suggestion, that the defendants—and he was acting on behalf of all the defendants, I assumed—the defendants were ready to proceed at a prompt date thereafter.

MR. STROMSTA: The first dates that—we talked to Mr. Durkin and Mr. Cohen also—the 9th or the 11th—

THE COURT: Well, of course. That's in the middle of the Judicial Conference, when I'm scheduled to be in Indianapolis. That's why they are free on those dates.

MR. STROMSTA: Well, without those dates, then, it looks to be the 23rd or 24th of May.

* * * * *

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	Chicago, Illinois
THE SPECIAL OCTOBER, 1984 GRAND JURY.	)	Tuesday, March 11, 1986
	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE FRANK J. MC GARR,
CHIEF JUDGE

Court Reporter: MR. ANTHONY W. LISANTI,
United States Courthouse,
219 South Dearborn Street,
Chicago, Illinois, 60604,
312/939-2092

[2] THE CLERK: The Special October, 1984 Grand Jury.

The Special October, 1984 Grand Jury, in open court, this date, and a quorum being present, presents three big indictments.

THE COURT: Good afternoon, Ms. Foreman. Good afternoon, ladies and gentlemen. I haven't seen you for a while.

I will accept the return of three indictments, in open court. I will order them filed.

---

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

The first of these is 86 GJ 229, it names a single defendant, his name is John L. Johnson. And the bond set by the Magistrate will stand as the bond for Mr. Johnson.

The second indictment is 83 GJ 485, it names a single defendant. I will order the issuance of a warrant for the defendant. The bond will be $4,500 on recognizance.

The third indictment is 86 GJ 195, it names a single defendant. He has been detained by the Magistrate without bond, therefore, I will not set a bond.

Everything going well with your Grand Jury?

THE FOREPERSON: Fine.

THE COURT: Fine. Thank you. Resume your deliberations. The next time, you will find me in the other courtroom again.

[Certificate of the Official Court Reporter omitted in printing]

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	Chicago, Illinois
THE SPECIAL OCTOBER,	)	Tuesday, March 18, 1986
1984 GRAND JURY.	)	4:00 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE FRANK J. MC GARR,
CHIEF JUDGE

Court Reporter: MR. ANTHONY W. LISANTI,
United States Courthouse,
219 South Dearborn Street,
Chicago, Illinois, 60604,
312/939-2092

[2] THE CLERK: The Special October, 1984 Grand Jury.

The Special October, 1984 Grand Jury, in open court, this date, and a quorum being present, presents two indictments.

THE COURT: Good afternoon, Ms. Foreman and ladies and gentlemen.

I will accept the return of two indictments, in open court, and order them filed.

---

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

The first is 86 GJ 210, it names a single defendant. The bond set by the Magistrate will stand as the bond for that defendant.

84 GJ 1444 names two defendants. As to each of them, I will order the issuance of warrants. We will set their bail at $4,500 on recognizance.

I haven't seen you for a while. How are things going with your Grand Jury?

THE FOREPERSON: Fine.

THE COURT: On a rainy day like this, you might as well be inside working.

Any problems? Good. Resume your deliberations.

[Certificate of the Official Court Reporter omitted in printing]

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	Chicago, Illinois
THE SPECIAL OCTOBER, 1984 GRAND JURY.	)	Tuesday, April 1, 1986

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE FRANK J. MC GARR,
CHIEF JUDGE

Court Reporter: MR. ANTHONY W. LISANTI,
United States Courthouse,
219 South Dearborn Street,
Chicago, Illinois, 60604,
312/939-2092

[2] THE CLERK: The Special October, 1984 Grand Jury.

The Special October, 1984 Grand Jury, in open court this day, and a quorum being present, presents one indictment.

THE COURT: Good afternoon, Ms. Foreman. Good afternoon, ladies and gentlemen.

I will accept the return of a single indictment, in open court, 86 GJ 286. It names a single defendant.

---

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

We need not set a bond or issue a warrant, the defendant has already been detained by the Magistrate. I will order the indictment filed.

Everything going well with your Grand Jury?

THE FOREPERSON: Fine.

THE COURT: Fine. Thank you. Resume your deliberations.

[Certificate of the Official Court
Reporter omitted in printing]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF THE	)
	)
SPECIAL OCTOBER 1984	)
	)
GRAND JURY	)

ORDER

On motion of the UNITED STATES OF AMERICA by ANTON R. VALUKAS, United States Attorney for the Northern District of Illinois, and the Court being fully informed, the request to replace Randall Eakins and Jeffrey Hertzberg, both members of the Special October 1984 Grand Jury, for business reasons, is hereby granted.

ENTER:

/s/ FRANK J. MCGARR
JUDGE

MAR 3 - 1986

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: Date: March 3, 1986

Name of Assigned Judge: Frank J. McGarr

Case Title: IN THE MATTER OF THE SPECIAL OCTOBER 1984 GRAND JURY

MOTION: ANTON R. VALUKAS
UNITED STATES ATTORNEY
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

USA VINCENT J. CONNELLY

MOTION TO REPLACE RANDALL EAKINS AND JEFFREY HERTZBERG, BOTH MEMBERS OF THE SPECIAL OCTOBER 1984 GRAND JURY, FOR BUSINESS REASONS is granted.

DOCKET ENTRY: Enter Order

* * * * *

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	85 CR 232
	)	
v.	)	Chicago, Illinois
	)	September 2, 1986
ROOSEVELT DANIELS, et al.,	)	11:00 a.m.
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE JAMES F. HOLDERMAN

APPEARANCES:

For the Government:	HOWARD M. PEARL, VICTORIA J. PETERS and MARK D. POLLACK Assistant U.S. Attorneys
For defendant Roosevelt Daniels:	MICHAEL H. KING JON K. STROMSTA ALLAN A. ACKERMAN
For defendant Edward Fitzgerald:	THOMAS ANTHONY DURKIN
For defendant Sandra Campbell:	DOUGLAS P. ROLLER
For defendant Kenneth Johnson:	JAMES A. GRAHAM

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

For defendant
Troy Campbell: MARIANNE JACKSON

For defendant
Lawrence Lee: MICHAEL B. COHEN

* * * * *

[33] Well, maybe the hearing, then, won't have an impact.

MR. KING: Your Honor, am I assuming you have denied my motion for a change of venue?

THE COURT: Well, you didn't file a written motion—

MR. KING: Yes, sir, that's right.

THE COURT: —and I think the last time I had indicated that if you want to file something in writing, you can—

MR. KING: Okay.

THE COURT: —but I will accept your motion today, contrary to what I told you earlier, I will accept your motion today as a motion to recuse me from this case, and I will deny that motion, because anything that I have learned about Mr. Daniels, I have learned in my capacity as a federal district judge, and the law is abundantly clear—I, myself, even attacked that law as a practitioner down in the Southern District of Alabama—the law is abundantly clear that I need not recuse myself. Frankly—

MR. KING: I'm glad that your Honor agrees with the issue, though.

THE COURT: I said I attacked it. I did not win. The Eleventh Circuit agreed with the Government on that.

All right, with regard to the defendant Campbell's motion to suppress the electronic surveillance, [34] I have reviewed the materials that have been submitted to me.

MR. KING: Your Honor, excuse me. I think that with respect to the Campbell motion for electronic surveillance, that was—I assume that that motion was filed on behalf of Mr. Daniels also. To the extent that it has not been, we join in that motion, so whatever rulings or pronouncement the

Court wanted to make, they should apply additionally to defendant Daniels.

MR. COHEN: Defendant Lee also joins in that motion to suppress.

MR. DURKIN: As does—

MR. GRAHAM: Defendant Johnson would also, Judge.

MR. MORRISON: As to defendant Rena Johnson, as well.

MR. DURKIN: As does defendant Fitzgerald.

MS. JACKSON: And Troy Campbell.

Your Honor, I think the motion says it's brought on behalf of Ms. Campbell and all the defendants.

THE COURT: It does. That's why I just referred to it as that. I will call it defendants', and you can put the apostrophe after the "s" if you desire. It's a motion to suppress electronic surveillance. I have reviewed the materials that have been submitted to me, and I find that under the circumstances presented here, defendant Daniels [35] consented to the recording of the conversations which the Government seeks to use.

It is clear to me that under the circumstances under which these recordings were made, under the circumstances under which the telephone was utilized by Mr. Daniels, his consent was clear. No further hearing is necessary. I feel strongly that the interceptions were proper under Title 18 United States Code Section 2511(c)(2), but to complete the record, I continue to review the Title 3 objections, and I find that there was sufficient probable cause presented to Judge Grady for the Title 3 wiretap, that the Government adequately established the need for the electronic surveillance utilized in the course of this investigation, and that the order authorizing the interception complied with the requirements of Title 3.

The defendants' nonspecific argument with regard to the failure to minimize is inadequate and insufficient to require a hearing thereon.

Furthermore, institutional phones utilized by inmates under these circumstances, in my opinion, offer inmates no expectation of privacy. It's clear. I, myself, even before this motion was presented, observed the notices that are placed at the Metropolitan Correctional Center. I observed those when I was a defense lawyer before this Court.

I think that there is no reasonable expectation [36] of privacy with regard to those.

But the basis of my holding is that Mr. Daniels consented and, therefore, the motion is denied.

MR. KING: Your Honor, may I ask a question about that?

THE COURT: Sure.

MR. KING: When you say that Mr. Daniels consented, you are referring to the notice in the consent form?

THE COURT: I'm referring to all the facts and circumstances that are present in the record in this case.

MR. ROLLER: Your Honor, there was an additional matter raised in the motion having to do with our request for an evidentiary hearing under Franks v. Delaware based upon material misrepresentations and omissions, and, in particular, your Honor, the fact that omitted from the affidavit—and this relates to what you have already spoken to—but omitted from the affidavit was any reference to the continued monitoring of Mr. Daniels' conversations by the MCC and receipt of those, although, according to the unsworn information provided to us so far, they were not reviewed. Nevertheless, there were an additional 11 recordings up until two weeks prior to the application.

THE COURT: Right, I understand, but the ruling that I have made today deals with consent. That's the thrust of my ruling, that Mr. Daniels consented to the tape [37] recording.

MR. ROLLER: Well, maybe I misunderstood your Honor. Are you prepared at this point in time to grant

the defendants an evidentiary hearing on any aspect of the motion to suppress electronic surveillance?

THE COURT: It is not necessary because the information that has been presented to me, there's been no denial that Mr. Daniels signed the statement that Mr. King referred to. There is no denial that the other circumstances upon which the Government has premised its position that Mr. Daniels consented in fact did not occur.

MR. KING: Your Honor, if I can briefly respond to that, we got the Government's response—

THE COURT: Yes?

MR. KING: —and we have not yet had an opportunity to reply, and the Government's response, if you look at the affidavit submitted in support of their response by I believe Lt. Reed, one of the paragraphs makes clear that all inmates, when they check into the institution, are required to sign the consent form. That's not a knowing consent form in any meaningful sense.

THE COURT: I considered that.

MR. KING: Well, but, that issue has not been articulated before you because the Government only argued that in its reply. If you considered that and you base your—

[38] THE COURT: I considered that.

MR. KING: If I may finish?

If you considered the consent as knowing and voluntary, and you are denying a hearing on that, fine, I just want the record to be clear on that. A required executed consent form is not a knowing consent form, and to the extent that there is any consent, it is a limited consent to the institutional—security of the institution. It has got nothing to do with an ongoing investigation by the MCC and FBI officials, but if your Honor has considered that and rejected it, then the record is clear, and that's all we—

MR. ROLLER: The only other matter I wanted to make on the consent issue, your Honor, is that I was planning, quite frankly, to address the Government's response, which I was not able to get until 4:30 on Friday, to our motion—

THE COURT: I didn't get it until that time on Friday, too, so—

MR. ROLLER: Fine. I was going to address that initially verbally and then with a written response.

The only thing I wish to point out to the Court in connection with the consent is that the Government did not address, distinguish, or in any other way come up with any cases contrary to United States v. Dalia, the principal case relied upon by the defendants that clearly [39] stated that these circumstances, in a federal correctional institution, assuming signature by an inmate, assuming the exact same notices, that it was not consent, and the Government did not provide—did not even mention Dalia in their reply.

But what I was referring to a few moments ago, your Honor, was that if, in fact, the Court has found that there was consent and therefore the interceptions were lawful, there is the issue that we raised in our motion that therefore, if you were to find that they were lawful, that the omissions of the continued interceptions by the MCC, and the Government having those, were material, clearly intentional, omissions from the affidavit, that entitles us, under Franks v. Delaware, to inquire further into it.

So we are beyond the consent. We are at the Franks v. Delaware issue having to do—I mean there's no question, Judge. The Government said we didn't present any affidavits. We didn't have to. We presented their own discovery material indicating that they had received these tapes through August 9th, that they had not reviewed

them, and that they hadn't even bothered telling Judge Grady that they had those.

If, in fact, the conversations were lawful, one of the things that Judge Grady was obligated by the statute to do was to make a determination of whether or not there [40] was a need for the electronic surveillance. He couldn't possibly have done that without knowing to what extent the Government was continuing to wiretap or continuing to monitor and record those conversations and what Daniels was saying on those conversations.

So, therefore, even though your Honor has found that he consented, I submit to the Court that we are still entitled to an evidentiary hearing on that issue.

Thank you.

THE COURT: All right, is there anything further?

MR. KING: I think the record is clear, but in case there is any doubt in anybody's mind, Mr. Daniels affirmatively asserts that he did not knowingly consent.

THE COURT: Well, I didn't see an affidavit to that—

MR. KING: We'll be happy to supply one. And the Court said the Court doesn't need a hearing.

THE COURT: I have already ruled on the basis of the materials that were submitted to me—

MR. KING: I understand, your Honor.

THE COURT: —in determining whether—

MR. ROLLER: We did specifically say that—I'm sorry—we did specifically say he did not consent.

THE COURT: I understand your legal position that he did not consent, but I did not see a factual affidavit to that effect.

* * * * *

[Certificate of the Official Court Reporter omitted in printing]

Supreme Court, U.S.
FILED
OCT 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-436 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROOSEVELT DANIELS, EDWARD FITZGERALD, LAWRENCE LEE, AND SANDRA CAMPBELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the term of a special grand jury convened under 18 U.S.C. 3331 was extended where the district court stated in a nunc pro tunc order that, before the grand jury's term expired, the court had determined that the grand jury had not completed its investigation.

2. Whether the district court correctly denied petitioners' pretrial motion to suppress telephone calls intercepted over prison telephones.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-436

ROOSEVELT DANIELS, EDWARD FITZGERALD, LAWRENCE LEE, AND SANDRA CAMPBELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 902 F.2d 1238. The opinion of the court of appeals dismissing petitioners' interlocutory appeal (Pet. App. 45-48) is reported at 848 F.2d 758; the orders of the court of appeals denying petitions for mandamus (Pet. App. 22-23, 44) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1990. A petition for rehearing was denied on June 11, 1990. Pet. App. 14. The petition for a writ of certiorari was filed on September 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After pleading guilty in the United States District Court for the Northern District of Illinois, petitioners were each convicted on one count of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), one count of conspiring to distribute cocaine, in violation of 21 U.S.C. 846, and—with the exception of petitioner Fitzgerald—other narcotics offenses.[1] Petitioner Daniels was sentenced to a total term of 40 years' imprisonment, to be followed by a life term of special parole; petitioner Fitzgerald was sentenced to a total term of 20 years' imprisonment, to be followed by a ten-year term of supervised release; petitioner Lee was sentenced to a total term of 15 years' imprisonment, to be followed by a ten-year term of special parole; and petitioner Campbell was sentenced to a total term of 12 years' imprisonment, to be followed by a term of five years' probation. The court of appeals affirmed.

1. From July 1984 to September 1985, petitioners, led by Daniels, operated a large-scale cocaine distribution ring in Chicago. After his arrest and detention on narcotics charges in April 1985, Daniels continued to direct the enterprise from his cell at Chicago's Metropolitan Correctional Center (MCC).

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[1] Petitioner Daniels was convicted on one count of operating a continuing criminal enterprise, in violation of 21 U.S.C. 848, seven counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1), and 14 counts of using a telephone to facilitate a narcotics transaction, in violation of 21 U.S.C. 843(b). Petitioner Lee was convicted on one count of distributing cocaine and three counts of using a telephone to facilitate a narcotics transaction. Petitioner Campbell was convicted on two counts of using a telephone to facilitate a narcotics transaction.

Daniels used the prison's telephone to communicate with his employees, including petitioners Fitzgerald and Campbell. In July 1985, under the Bureau of Prisons' policy to conduct random monitoring of inmates' calls, MCC officials started monitoring Daniels' calls. After discovering that Daniels was running his cocaine trafficking business from prison, MCC officials provided tape recordings of Daniels' calls to the Federal Bureau of Investigation. FBI agents, in turn, obtained judicial authorization to continue monitoring Daniels' calls. Gov't C.A. Br. 6-8, 10, 37-39.

Petitioners filed a pretrial motion to suppress the tape recordings of conversations intercepted over the MCC telephones. The district court denied the motion, concluding that Daniels had consented to the monitoring of his telephone calls. Gov't C.A. Br. 37-38.

2. Petitioners pleaded guilty to charges contained in a second superseding indictment returned by the Special October 1984 Grand Jury sitting in the Northern District of Illinois. The grand jury had been convened under 18 U.S.C. 1331 in October 1984.[2]

a. In March 1986, before the expiration of its initial 18-month term, the grand jury voted to continue its work.[3] No formal written order extending the

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[2] The events and legal issues surrounding the convening and extending of the Special October 1984 Grand Jury have previously been raised before this Court. See *Rosenstein* v. *United States*, cert. denied, 487 U.S. 1236 (1988). We are providing counsel for petitioner a copy of our brief in opposition in *Rosenstein*.

[3] In July and October 1985—before the extension of its term—the grand jury had returned an initial and first superseding indictment against petitioners. See Gov't C.A. Br. 2.

grand jury's term was entered, although the grand jury continued to appear weekly before Chief Judge McGarr (and later Chief Judge Grady) for ten months after the expiration of the 18-month term. The grand jury returned the second superseding indictment against petitioners in August 1986. Gov't C.A. Br. 9-11; see also Pet. App. 67-74.

Following the discovery that there was no written order extending the Special October 1984 Grand Jury, the United States Attorney's Office presented a corrective nunc pro tunc order to Judge McGarr. On March 3, 1987, Judge McGarr entered a nunc pro tunc order stating that he had determined in March 1986 that the grand jury had not completed its work. Pet. App. 51-54.

b. In the meantime, petitioners—having pleaded guilty in September 1986—filed in the district court on February 27, 1987, an emergency motion for a writ of habeas corpus. Petitioners contended that the Special October 1984 Grand Jury was without authority to indict when it returned the second superseding indictment, because the grand jury's term had not been properly extended. Petitioners therefore sought dismissal of that indictment. The district court denied that motion. Pet. App. 15-21. Petitioners then sought a writ of mandamus in the court of appeals. On March 5, 1987, the court of appeals denied the petition as "premature," since "[t]he district court has not yet had an opportunity to evaluate all of the evidence with regard to petitioners' claim." *Id.* at 22-23.

On March 23, petitioners returned to the district court and filed a motion to withdraw their guilty pleas and dismiss the indictment, renewing their contention that the grand jury's term had not been properly extended. Pet. App. 24-40.

c. While petitioners' motion was under advisement, the Seventh Circuit issued its decision in *United States* v. *Taylor*, 841 F.2d 1300, cert. denied, 487 U.S. 1236 (1988), upholding other indictments returned by the Special October 1984 Grand Jury after its initial 18-month term had expired. The court concluded that 18 U.S.C. 3331(a)[4] extends the grand jury's term whenever the district court makes a determination before the expiration of the grand jury's term that the grand jury has not completed its business. Thus, the statute "requires only this judicial determination—not the ministerial act of memorializing it by a formal order—to effect the valid extension of a special grand jury." 841 F.2d at 1306.

The court of appeals acknowledged that, although it would have been preferable for the district court to enter an order at the time of the extension, the absence of a contemporaneous written order was not fatal if there was other "reliable and unequivocal" evidence establishing that the district court actually made the determination that the special grand jury had not finished its business. 841 F.2d at 1308. Based on Judge McGarr's order of March 3, 1987 (Pet. App. 51-54), the court of appeals found the

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[4] Section 3331(a) provides in pertinent part:

> The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in [18 U.S.C. 3333(e)].

required proof that the district court had made the determination that was required to extend the special grand jury's term. 841 F.2d at 1309.[5]

d. On April 8, 1988, the district court—on the basis of the recent decision in *Taylor*—denied petitioners' motion to withdraw their guilty pleas and dismiss the indictment. The court concluded that

> [t]he statements made by the Seventh Circuit with regard to the facts that were before it in connection with Mr. Taylor's case are precisely the facts that would be before me in connection with the determination as to the codefendants [*i.e.*, petitioners]. I believe the grand jury was validly extended, and the indictment need not be dismissed on that basis.

Pet. App. 42.[6]

3. In the court of appeals, petitioners contended that the second superseding indictment was invalid because Judge McGarr's nunc pro tunc order "is not reliable evidence of [his] determination to extend

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[5] The court noted that "Judge McGarr's finding is corroborated by the fact that the 1984 Grand Jury voted in March to continue its work." 841 F.2d at 1309; see *id.* at 1303 n.8.

[6] The court also denied petitioners' request for an evidentiary hearing, "since all the pertinent facts really are clear in the record." Pet. App. 42.

Petitioners promptly appealed from the court's order and, in the alternative, sought a writ of mandamus. On April 25, 1988, the court of appeals denied petitioners' renewed motion for a writ of mandamus, citing its recent decision in *United States* v. *Taylor*, *supra*. Pet. App. 44. In May, the court of appeals also dismissed petitioners' interlocutory appeal as "premature." *Id.* at 45. Petitioners refiled their appeal after the imposition of sentence.

the grand jury." Pet. App. 3.[7] The court of appeals, however, rejected that contention and affirmed petitioners' convictions. Pet. App. 1-13. The court acknowledged that petitioners

> have submitted evidence, which [the district court] may have brushed aside too quickly, that the order is not reliable. The order was drafted by government lawyers and given to Judge McGarr to sign without notice to [petitioners] or to their lawyers. It is signed but of course not attested.

Ibid. Nonetheless, the court "assume[d] that our judges are not only honest but also not unduly suggestible, and therefore [concluded] that Judge McGarr would not have signed an order stating that he recalled extending the grand jury unless he accurately recalled having done so." *Id.* at 7. And the court pointed out that that order "was consistent with the fact that the grand jury had voted to extend its term." *Ibid.* The court therefore determined that it was unnecessary to "remand for a further hearing at which Judge McGarr would be placed under oath, examined, and cross-examined—with results entirely predictable." *Ibid.*

Petitioners also contended that the district court should have suppressed "evidence obtained by the FBI's recording of Daniels' telephone calls from jail." Pet. App. 12. The court of appeals rejected that argument, holding that the FBI agents had properly intercepted those calls under 18 U.S.C. 2510(5)(a)(ii), which allows wiretapping "by an

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[7] To the extent petitioners argued that Section 3331(a) requires a formal order to extend the term of the grand jury, the court of appeals declined to reconsider *United States* v. *Taylor*, *supra*. Pet. App. 2.

investigative or law enforcement officer in the ordinary course of his duties."[8] In the court's view, "[t]his describes what the FBI agents were doing when listening to Daniels conduct an illegal enterprise." Pet. App. 13.[9]

ARGUMENT

1. Petitioners contend (Pet. 11-17) that the court of appeals erred in considering "the ghostwritten statements * * * contained in Judge McGarr's order" as sufficient evidence that he had determined that the grand jury had not completed its investigation. Pet. 15. The court of appeals acknowledged the peculiar circumstances surrounding that order, *i.e.*, that "[t]he order was drafted by government lawyers and given to Judge McGarr to sign without notice to [petitioners] or to their lawyers." Pet. 3. Nonetheless, those facts did not undermine the court's conclusion that "Judge McGarr would not have signed an order stating that he recalled extending the grand jury unless he accurately recalled having done so." Pet. 7; cf. *Harris* v. *Rivera*, 454 U.S. 339, 347 (1981) ("well-established presumption that the judge adhered to basic rules of procedure"). Indeed, the court pointed out that Judge McGarr's recollection "was consistent with the fact that the grand jury had voted to extend its term." *Ibid.*; see *United*

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[8] In so holding, the court declined to decide "whether this is a case of consent by one of the parties to the phone conversation (namely Daniels) and is therefore within the exception in 18 U.S.C. 2511(2)(c)." Pet. App. 12.

[9] Petitioner Daniels also claimed that he had been coerced into pleading guilty. The court of appeals rejected that claim, Pet. App. 8-12, and Daniels has not sought further review of it.

States v. *Taylor*, 841 F.2d at 1303 n.8.[10] In these circumstances, contrary to petitioners' submission here, an evidentiary hearing was not required.

2. Petitioners also contend (Pet. 18-24) that Section 3331(a) requires a formal order—not simply "a judicial determination"—to extend the term of the grand jury. For the reasons stated in our brief in opposition in *Rosenstein* v. *United States*, 487 U.S. 1236 (1988) (see note 2, *supra*), the Seventh Circuit has adopted the most reasonable construction of Section 3331(a)—"that what operates to extend the term of a special grand jury is the district court's determination that the grand jury's work is not com-

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[10] Petitioners assert (Pet. 17) that the absence of a contemporaneous transcript of the March 1986 grand jury session in which Judge McGarr extended the term, see Pet. App. 52 ¶ 4, categorically refutes his recollection. To be sure, Fed. R. Crim. P. 6(e)(1) provides that "[a]ll proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device." But petitioners offer no sound reason for treating an apparent lapse in procedure (which otherwise "shall not affect the validity of the prosecution," Fed. R. Crim. P. 6(e)(1)) as tantamount to conclusive proof that the grand jury had not convened, particularly in the face of evidence to the contrary.

For that reason as well, petitioners mistakenly suggest (Pet. 16) that the court of appeals' decision conflicts with *United States* v. *Marr*, 856 F.2d 1471, 1472 (10th Cir. 1988).

In any event, it is not clear that petitioners would be entitled to the relief sought—dismissal of the second superseding indictment—even if Judge McGarr's recollection were mistaken. The "de facto officer" doctrine might well validate the actions of the Special October 1984 Grand Jury—an otherwise lawfully constituted and properly functioning grand jury, particularly since the convictions in this case were based on petitioners' guilty pleas. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 142-143 (1976); *Norton* v. *Shelby County*, 118 U.S. 425, 441-442 (1886).

pleted, rather than the ministerial act of formally memorializing that determination." U.S. Br. in Opp. 7-8; see *id.* at 8-12. Since the Court declined to review that issue two Terms ago, and since the issue has arisen in no other court and is unlikely to do so, further review of petitioners' contention is not warranted.

3. Finally, petitioners renew their claim (Pet. 24-30) that the district court should have suppressed evidence of Daniels' conversations intercepted over the prison telephones. Under 18 U.S.C. 2510(5)(a)(ii), federal authorities may intercept telephone communications without first obtaining judicial authorization if the intercepting device was "being used * * * by an investigative or law enforcement officer in the ordinary course of his duties." Here, in accord with Bureau of Prison regulations, see 28 C.F.R. 540.101,[11] officials at the MCC adhered to a policy of randomly monitoring inmate calls, and thus were alerted to petitioner Daniels' continuing criminal activities when they randomly monitored his calls. See Gov't C.A. Br. 37-38. Contrary to petitioners' assertion (Pet. 25-26), the Seventh Circuit and other courts have consistently held that such random monitoring falls within the "ordinary course of duties" exception in Section 2510(5)(a)(ii). *E.g.*, *United States* v. *Sababu*, 891 F.2d 1308, 1329 (7th Cir. 1989); *United States* v. *Feekes*, 879 F.2d 1562, 1565-1566 (7th Cir. 1989); see *United States* v. *Paul*, 614 F.2d 115, 116-117 (6th Cir. 1980).[12]

cert denied 464 U.S. 941

[11] That regulation provides for monitoring of inmate calls "to secure the security and orderly management of the institution and to protect the public." 28 C.F.R. 540.101.

[12] The statute, in that regard, is consistent with the Fourth Amendment. See *Lanza* v. *New York*, 370 U.S. 139, 142-143

BEST AVAIL

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

OCTOBER 1990

(1962); *United States* v. *Hearst*, 563 F.2d 1331, 1344-1346 (9th Cir. 1977). Cert denied, 435 U.S. 1000 (1978).

Petitioners err in claiming (Pet. 26) that the decision below conflicts with *Campiti* v. *Walonis*, 611 F.2d 387 (1st Cir. 1979). In that case, the law enforcement officer monitored one call for investigative purposes, not in accord with prison security procedures. The court held that under those circumstances the monitoring activity fell outside the statutory exception in Section 2510(5)(a)(ii). 611 F.2d at 392. Here, by contrast, the prison officials intercepted Daniels' calls under a random monitoring policy specifically designed to ensure prison safety.

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No. 90-436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROOSEVELT DANIELS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONERS

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ARGUMENT

A. The Brief for the United States in Opposition ("G't Br.") to the certiorari petition treats this case as though an extension of the Special October 1984 Grand Jury was sought and obtained. On this pretext, it seeks to trivialize the issue presented by pretending that the absence of a written order was purely formalistic.

If that were this case, responsible advocacy would permit a credible argument in opposition to certiorari. But that is *not* the instant case, as the United States knows

full well, and the liberties it takes to mask the real issue and hide from this Court the facts of record are *not* responsible advocacy.

Our petition for certiorari—which the United States essentially recasts on the strength of assumed facts neither found below nor even arguably suggested by the record evidence—accurately states the circumstances leading to the fundamental jurisdictional flaw which the Government refuses to face: *i.e.*, that there was never any order entered, nor even an oral directive, extending the life of the October 1984 Special Grand Jury. That inescapable failure is not one which can be "papered over" after the fact so as to resuscitate a grand jury whose time has run.

We need not repeat here the legal arguments in our petition that compel this conclusion. What is needed, however, is a statement of the points that were either misstated or unstated in the Government's opposition—points that underscore why the jurisdictional error committed below should, in the interest of justice and of preserving the integrity of the judicial process, be reviewed and corrected by this Court, rather than being brushed aside as nothing more than a "troubling" but unimportant technical failure (as the United States urges). To this end, we note the following:

1. The Special October 1984 Grand Jury was never extended, by judicial order or otherwise.[1]

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[1] Petitioners seek review, *inter alia*, of the Seventh Circuit's holding that a judge's uncommunicated mental determination that a grand jury has not finished its business may suffice to extend a grand jury. Petitioners contend that, even under the Seventh Circuit's tortured reading of the governing statute, 18 U.S.C. §3331(a), that determination never occurred. No evidentiary hearing has been permitted on this point.

2. Petitioners have a record of every single appearance of the Grand Jury before Judge McGarr during the relevant time period. No extension order was ever requested, considered or entered. The Government's inference of a possible unrecorded Grand Jury appearance before Judge McGarr in March 1986 (G't Br. 9 n.10) is not supported by *any* evidence and was *never even suggested below.*

3. The Government relies heavily on a purported vote among the grand jurors to extend the Grand Jury's term. G't Br. 6 n.4, 7, 8. Not only is this a contested evidentiary matter that has never been presented to a trier of fact, but, even if true, there is no indication whatsoever that any such vote (if it did indeed occur) was ever communicated to Judge McGarr. To the contrary, in February 1987, when the Government realized that no extension order had been sought, it reassembled thirteen former members of the Grand Jury as part of its "*nunc pro tunc*" strategy. The Government obtained affidavits from only three of those grand jurors. Significantly, these affidavits do *not* state that the Grand Jury appeared before Judge McGarr, at the time of the alleged vote or any time thereafter, to inform him of the alleged vote or to otherwise seek an extension. Moreover, ten grand jurors had absolutely no recollection of ever appearing before Judge McGarr for an extension.[2] For this evidence to be treated in so muddled a fashion in the Government's brief is most disturbing and is hardly fair or helpful to this Court.

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[2] Compare these *facts* with the misleading language of the purported *nunc pro tunc* order: "The foreman and other members of the Special October 1984 Grand Jury recall that they appeared before this Court in March 1986, and that at that time this Court extended the Grand Jury's term of service." Pet. App. 51-52.

4. Equally troubling is the Government's reliance on the "*de facto* officer" doctrine. G't Br. 9 n.10. Its use of that doctrine in the present context is completely at odds with the law in other circuits. For example, the Second Circuit has specifically held that a "grand jury is a creature of statute and that there can be no such thing as a *de facto* grand jury." *United States v. Macklin*, 523 F.2d 193, 195 (2d Cir. 1975) (citations omitted). *See also United States v. Armored Transport, Inc.*, 629 F.2d 1313, 1316 (9th Cir. 1980).

5. The Government's reliance on *United States v. Taylor*, 841 F.2d 1300 (7th Cir. 1988) (G't Br. 5, 6, 8-10) is also badly misplaced. *Taylor* was not concerned with the threshold question at issue here regarding the Government's belated and surreptitious procurement of Judge McGarr's *nunc pro tunc* order. Rather, the *Taylor* court assumed the *nunc pro tunc* order to be valid since the issue here had not been raised in *Taylor*, and thus determined that Judge McGarr's judicial order could be treated as "reliable and unequivocal" evidence of the Grand Jury's extension. *Taylor*, 841 F.2d at 1308.

As acknowledged below by the Seventh Circuit, the adequacy of Judge McGarr's "order" was simply not confronted in *Taylor*. *United States v. Daniels*, 902 F.2d 1238, 1241 (7th Cir. 1990), Pet. App. 3-5. *Id.* When that issue was first confronted in this case, the Seventh Circuit ruled—as indeed is must—that Judge McGarr was utterly without jurisdiction when he signed the Government's ghostwritten *nunc pro tunc* "order" and that the so-called "order" was "not really an order" at all. *Daniels*, 902 F.2d at 1241, Pet. App. 3. Consequently, there is not now, nor was there ever, any order extending the Special October 1984 Grand Jury.

B. Only a brief comment is needed on the second question presented. The Government attempts to minimize the certworthiness of this issue by portraying the Metropolitan Correctional Center's interception of Petitioner Daniels' telephone calls as "random monitoring." G't Br. 3, 10. The MCC monitored none of Daniels' telephone calls until they received informant information regarding Daniels' use of the MCC telephones. Immediately following their receipt of this information, MCC officials conducted a lengthy and focused campaign to intercept all of Daniels' telephone calls without a warrant. If such conduct by the MCC falls within the Government's and the Seventh Circuit's definition of "random monitoring in the ordinary course of duty," then the "ordinary course" exception to Title III's warrant requirement has indeed engulfed the rule.

CONCLUSION

The Special October 1984 Grand Jury was never extended. Then-chief Judge McGarr was not even aware of a need to extend the Grand Jury's term before it expired in March 1986. One year after the Grand Jury's term had expired, the Government manufactured false evidence in an attempt to avoid the consequences of its mistake. The Government now suggests this is an unimportant issue not worthy of this Court's review. The Government is wrong. The District Court had no jurisdiction over Petitioners. The Government "backdoored" a senior judge (now retired) who had no case pending before him and obtained a false "order" which Government attorneys presented as binding to the judge to whom Petitioners' case *was* assigned. In the Seventh Circuit, the Government's

attorneys argued that potentially hundreds of defendants might be affected. Now they say this case stands alone. G't Br. 10. Never do they say they are proud of what they did.

The conduct under scrutiny so fundamentally undermines the integrity of the criminal justice system by countenancing a *post hoc* "fix" of an obvious jurisdictional failure that it must not escape plenary review of this Court. Law and circuit court precedents are clear about what is required to extend the life of a grand jury. Nowhere do they permit the course followed by the prosecution here. A grant of certiorari is therefore compelled.

In addition, the Government's interception of Petitioner's telephone calls cannot be squared with *Campiti v. Walonis*, 611 F.2d 387 (1st Cir. 1979). Supreme Court review of the lower court's denial of Petitioners' suppression motion is therefore necessary to resolve this conflict in the circuits.

Respectfully submitted,

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